No. 96-423

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RONALD COULTER, ET AL.,

Petitioners,

—v.—

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF METROPOLITAN LIFE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 15, 1996

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QUESTIONS PRESENTED

Petitioners contend that this case presents the question whether the approval of a nationwide class action settlement resolving allegations of improper life insurance sales solicitations violates "judicial comity, States' sovereignty, and the McCarran-Ferguson Act." That question, however, was not raised in the courts below, is irrelevant to the issues in the case, and is not properly before the Court. The actual questions presented are:

1. Whether petitioners, by failing to raise their new arguments in the courts below, have waived their right to raise those issues in a petition for a writ of certiorari.

2. Whether petitioners' attacks on the district court's approval of the class action settlement are irrelevant to the orders actually appealed to and decided by the Court of Appeals, which affirmed four discrete orders that (*a*) denied the motion of petitioners Ronald and Anissa Coulter to "intervene" in the action, (*b*) denied the requests of the Coulters and other petitioners to exclude themselves from the class after the court-ordered opt-out deadline had passed, (*c*) dismissed without prejudice the requests of petitioners Edward and Paulette Beliunas, *et al.* for a declaration of their status as class members, and directed them to resubmit their motion — with evidentiary support — to a special master, and (*d*) denied the Coulters' motion for "injunctive relief," "remedial measures" and "sanctions" based on two Metropolitan Life Insurance Company sales representatives' allegedly improper contacts with absent potential class members.

3. Whether petitioners have shown any factual or legal arguments that would justify granting a writ of certiorari in light of the considerations noted in Sup. Ct. R. 10.

LIST OF PARTIES AND LIST OF PARENT COMPANIES AND SUBSIDIARIES

The names of the petitioners are listed on page ii of the Petition, except that "James Romano" was identified as "John Romano" in the district court. The Petition is moot as to petitioner Kamel, because she filed a timely request to exclude herself from the *Horton* settlement class.

The respondents are Sherry Horton, Joyce Armbruster and Deborah K. Spamer, individually and as representatives of a class of persons similarly situated; and Metropolitan Life Insurance Company. There were no other parties in the Court of Appeals.

Metropolitan Life Insurance Company has no parent company. It has no non-wholly owned subsidiaries other than the following:

Blodgett Holdings, Inc.

Briggs Holdings, Inc.

Briggs Plumbing Products, Inc.

Chart House Enterprises, Inc.

Cicero/Cermak Corporation

Cloverleaf Properties, Inc.

Coating Technologies International, Inc.

Dan River, Inc.

Eclipse Claim Services Inc.

First Health Associates, Inc.

Frialator International, Limited

Genesis Seguros de Retiro, S.A.

Genesis Seguros Generales, Sociedad Anonima de Seguros y Reaseguros

GS Blodgett Corporation

GS Blodgett Inc.

GS Blodgett International Ltd.

Interbroker, Correduria de Reaseguros, S.A.

Kolon-Met Life Insurance Company

Lone Star Industries, Inc.

Luther's Bar-B-Q, Inc.

Magikitch'n, Inc.

Met Life International Real Estate Equity Shares, Inc.

Metric Apartment Co-Investment Trust, Inc.

Metric Institutional Apartment Fund II, L.P.

Metropolitan Lloyds Insurance Company of Texas

Metropolitan Structures

Metropolitan Structures, Inc.

Metropolitan Structures West, Inc. d/b/a MS Management Services

Morguard Investments Limited

MS Management Services, L.P.

National Electronic Information Corporation

Pitco Frialator, Inc.

Santander Met, S.A.

Seguros Genesis, S.A. (Mexico)

Seguros Genesis, S.A. (Spain)

State Street Research Portfolios, Inc.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

LIST OF PARTIES AND LIST OF PARENT COMPANIES AND SUBSIDIARIES ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

STATUTES AND OTHER PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. The *Horton* Complaint 3
B. The Coulters' Pennsylvania Action 4
C. The *Horton* Class Settlement 5
D. The Coulters' Motion to "Intervene" 7
E. The Motions for Late Exclusion 9
F. The Motion for a Declaration as to Class Membership 10
G. The "Remedial Measures" Motion 10
H. The Appeals 12

REASONS FOR DENYING THE WRIT 13

I. NONE OF THE ISSUES IN THE PETITION WAS RAISED IN THE COURTS BELOW. 14

II. NONE OF THE ISSUES LITIGATED BELOW IS RAISED IN THE PETITION. 16

III. THERE IS NO MERIT TO THE ARGUMENTS IN THE PETITION. 18

IV. THERE IS NO MERIT TO THE ARGUMENTS THAT PETITIONERS ACTUALLY RAISED BELOW. 22

A. The Motion for "Intervention" Was Properly Denied. 22

B. The Denial of the Motions for Late Exclusion Was Within the District Court's Sound Discretion. 25

C. The Order Referring the Motion for a Declaration to a Special Master Is Interlocutory and Unappealable, and in Any Event Was Within the District Court's Sound Discretion. . . 27

D. The Denial of the Motion for "Remedial Measures" Was Within the District Court's Sound Discretion. 28

CONCLUSION 30

TABLE OF AUTHORITIES

PAGE

Cases:

Alaniz v. California Processors, Inc., 73 F.R.D. 269 (N.D. Cal. 1976) 23

Alaniz v. California Processors, Inc., 73 F.R.D. 289 (N.D. Cal. 1976), *aff'd sub nom. Alaniz v. Tillie Lewis Foods*, 572 F.2d 657 (9th Cir.), *cert. denied*, 439 U.S. 837 (1978) 24

BMW of North America v. Gore, 116 S. Ct. 1589 (1996) 21

In re Baldwin-United Corp., 105 F.R.D. 475 (S.D.N.Y. 1984) 25

Carlough v. Amchem Products, Inc., 10 F.3d 189 (3d Cir. 1993) 25

Deckert v. Independence Shares Corp., 311 U.S. 282 (1940) 27

Dexter v. Equitable Life Assurance Society, 527 F.2d 233 (2d Cir. 1975) 18

Donaldson v. United States, 400 U.S. 517 (1971) 22

FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990) 15

Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom. Amchem Products, Inc. v. Windsor*, 65 U.S.L.W. 3338 (U.S. Nov. 1, 1996) (No. 96-270) 16

Gray v. Nationwide Mutual Insurance Co., 223 A.2d 8 (Pa. 1966) 20

Grimes v. Crown Life Insurance Co., 857 F.2d 699 (10th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989) 19

Martin Insurance Agency, Inc. v. Prudential Reinsurance Co., 910 F.2d 249 (5th Cir. 1990) 19

National Student Marketing Litigation v. Barnes Plaintiffs, 530 F.2d 1012 (D.C. Cir. 1976) 26

Officers for Justice v. Civil Service Commission, 473 F. Supp. 801 (N.D. Cal. 1979), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983) 23

Peters v. Welsh Development Agency, 920 F.2d 438 (7th Cir. 1990) 27

Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380 (1993) 25

Quackenbush v. Allstate Insurance Co., 116 S. Ct. 1712 (1996) 19, 27

Resnick v. American Dental Association, 95 F.R.D. 372 (N.D. Ill. 1982) 24

Roberts v. Heim, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,394 (N.D. Cal. Mar. 30, 1989) 23

Rothman v. Fillette, 469 A.2d 543 (Pa. 1983) 20

Seasongood v. K & K Insurance Agency, 548 F.2d 729 (8th Cir. 1977) 19

Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996) 20

United States v. Automobile Manufacturers Association, 307 F. Supp. 617 (C.D. Cal. 1969), *appeal dismissed*, 397 U.S. 248 (1970) 23

United States v. Cavin, 39 F.3d 1299 (5th Cir. 1994) 19

United States v. Franklin Parish School Board, 47 F.3d 755 (5th Cir. 1995) 24

In re VMS Securities Litigation, 145 F.R.D. 458 (N.D. Ill. 1992), *aff'd in part and vacated in part*, 21 F.3d 139 (7th Cir. 1994) 26

Warth v. Seldin, 422 U.S. 490 (1975) 29

Webcor Electronics v. Whiting, 101 F.R.D. 461 (D. Del. 1984) 23

Statutes and Rules:

McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 . . . . . 2, 6, 12, 18, 19

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 . . . . . 2, 17, 22, 27

Fed. R. Civ. P. 6(b) 2, 9, 12, 17, 25, 26

Fed. R. Civ. P. 23 . . . . . 6, 10, 12, 14, 15, 17, 19

Fed. R. Civ. P. 24 . . . . . 2, 8, 9, 17, 22, 23, 24, 25

Fed. R. Civ. P. 53 27

Fed. R. Civ. P. 54(b) 6

Sup. Ct. R. 10 . . . . . 13, 22, 26

Treatises:

2 Carl Robert Aron *et al.*, *Class Actions* § 22:07 (1987) 24

2 James W. Moore *et al.*, *Moore's Federal Practice* ¶ 6.08 (2d ed. 1996) 26

3 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 16.16 (3d ed. 1992) 25

Robert L. Stern *et al.*, *Supreme Court Practice and Procedure* § 6.26 (7th ed. 1993) 15

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BRIEF OF METROPOLITAN LIFE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent Metropolitan Life Insurance Company ("MetLife") respectfully submits this brief in opposition to the Petition for a Writ of Certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 78 F.3d 1533. [Appendix to Certiorari Petition ("Pet. App.") 4a.] The four district court orders appealed from, and the district court's separate findings of fact and conclusions of law in support of one of those orders, are unreported. [Appendix hereto ("App.") 5a, 9a, 32a, 42a, 45a.]

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND OTHER PROVISIONS INVOLVED

The statutes and rules involved are 28 U.S.C. § 1291 (appeals from final decisions of district courts) and Federal Rules of Civil Procedure 6(b) (enlargement of time) and 24 (intervention). Petitioners also purport to raise an argument under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. The text of those provisions is set out in the appendix to this brief. [App. 1a.]

STATEMENT OF THE CASE

This case arises out of a nationwide class action brought by respondents Sherry Horton, Joyce Armbruster and Deborah K. Spamer (the "*Horton* plaintiffs") against MetLife alleging misleading sales solicitations by MetLife sales representatives. The district court approved a settlement on October 25, 1994.

The Petition purports to attack the district court's order approving the settlement and certifying the settlement class. However, none of the petitioners appealed from that order. As the Court of Appeals noted, "[t]he [district] court's approval of the settlement is not an issue in these appeals." [Pet. App. 12a n.6.] The only orders that petitioners appealed were (*i*) an order denying the motion of petitioners Ronald and Anissa Coulter (the "Coulters") for leave to intervene so they could "sever" (*i.e.*, exclude *en masse*) all Pennsylvania residents from the class or seek appointment of their attorney as co-counsel to the class, (*ii*) an order denying the motions of the Coulters and 14 other petitioners (the "Late Exclusion Movants")[1] to be excluded from

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1. In addition to the Coulters, the Late Exclusion Movants are petitioners D. Connor, R. Connor, Johns, Kablach, Maharg, McConnell, (continued...)

the class after the opt-out deadline set by the court, (*iii*) an order effectively referring to a special master the motion of 24 other petitioners (the "Declaration Movants")[2] for a declaration as to whether they are class members, and (*iv*) an order denying the Coulters' motion for an injunction, sanctions and other relief based on allegedly improper contacts by two MetLife employees with certain potential members of the class.

A. The *Horton* Complaint

Respondents Sherry Horton and Joyce Armbruster commenced this action against MetLife on November 1, 1993, on behalf of a nationwide putative class.[3] The Complaint, as subsequently amended, alleged that certain MetLife sales representatives had sold whole life insurance policies as

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1. (...continued)
Myers, M. Palmer, T. Palmer, Rohm, J. Romano, Wise and Yokel. Petitioner Mary Romano joined the Late Exclusion Movants' notice of appeal, although she had not actually requested any relief from the district court. Petitioner Clarence Ridgeway had moved the district court for late exclusion, but he did not file a notice of appeal from the order [App. 65a] denying his late exclusion request. Instead, he purported to appeal from the separate order referring the motion of Edward Beliunas *et al.* to a special master. [App. 68a.]

2. The Declaration Movants were referred to in the Court of Appeals as the Beliunas Appellants. They are petitioners E. Beliunas, P. Beliunas, Brooks, Charles, Daughenbaugh, Freiwald, D. Heathcote, N. Heathcote, Hemcher, K. Johnson, M. Johnson, Kamel, E. Knorr, J. Knorr, G. Liptak, R. Liptak, Magnes, McCue, Ondrusek, Peterson, Rasel, Riehl, Valenta, C. Wiles and R. Wiles. Petitioner Ridgeway was not a Declaration Movant but was listed as an appellant in the Declaration Movants' notice of appeal.

3. Respondent Deborah K. Spamer subsequently was added as a named plaintiff in the Second Amended Complaint.

retirement or savings plans without adequately disclosing that the products sold were life insurance policies.

The *Horton* plaintiffs charged that "Met offices throughout the country" used the same alleged method to sell life insurance policies as savings or retirement plans "to licensed nurses" as well as "to others, including, but not limited to, chiropractors and small business employees in the State of Pennsylvania." [Record on Appeal ("R.") 1-17-8.] Those activities allegedly took place in various MetLife sales offices, including the Pittsburgh Sales Office in Upper St. Clair, Pennsylvania, and the Rick Urso & Associates Sales Office in Tampa, Florida (the "Tampa Sales Office"). The Complaint asserted claims under the federal Racketeer Influenced and Corrupt Organizations Act (RICO), the Florida Civil Remedies for Criminal Practices Act, and the common law of fiduciary duty and fraud, and it sought rescission, restitution, treble damages, punitive damages, attorneys' fees and costs on behalf of the nationwide putative class.

B. The Coulters' Pennsylvania Action

On March 25, 1994, almost five months after the *Horton* case was filed, the Coulters sued MetLife in state court in Pennsylvania. [App. 13a, ¶ 14.] MetLife removed the case to federal court, where it currently is pending under the caption *Coulter v. Metropolitan Life Insurance Company*, No. 94-0629 (W.D. Pa.). The Coulters filed an amended complaint on May 13, 1994. [R. 5-77, Ex. 2.]

The *Coulter* case asserts claims on behalf of the Coulters, various other petitioners here, and a putative "subclass" consisting of Pennsylvania residents who purchased "savings" or "retirement" plans "which had life insurance components, which in reality were nothing more than whole life insurance policies." [*Id.*, Ex. 2 at 9-10, ¶ 16.] No class has been certified in that case; nor has the court appointed the Coulters or their attorneys as class representatives or class counsel. [App. 13a, ¶ 17.]

C. The *Horton* Class Settlement

After several months of negotiations, the *Horton* plaintiffs and MetLife entered into a settlement agreement on April 7, 1994. The proposed settlement offered each eligible class member full restitution in the form of either (*i*) a cash refund of all net premiums paid for the policy, plus interest, or (*ii*) the opportunity to exchange an in-force life insurance policy for an annuity funded in the amount of the cash refund. Alternatively, class members could retain their life insurance policies unchanged. In addition to the settlement relief, MetLife agreed to pay the *Horton* plaintiffs' attorneys' fees. [App. 49a-50a, ¶¶ 5-6.]

On April 22, 1994, the district court entered an order certifying a settlement class, appointing class counsel, preliminarily approving the proposed settlement, approving the form of notice to the settlement class, and scheduling a hearing to evaluate the fairness of the proposed settlement. The settlement class consists of

> all persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products, from (a) the [Tampa Sales Office] between January 1, 1988 and October 31, 1993, or (b) from any other sales office of MetLife between January 1, 1990 and October 31, 1993. [R. 3-48-2; R. 11-225-1.]

Under the terms of the settlement agreement and the district court's order, class members could exclude themselves from the class by mailing an opt-out request to the settlement administrator no later than June 13, 1994. Class members who chose not to exclude themselves were given an opportunity to appear and object to the settlement. [App. 32a, 40a, 54a.]

On July 18, 1994, the district court held a full-day evidentiary hearing on the proposed settlement. The Coulters, who were among the very few persons to submit objections, appeared through counsel at the hearing and presented their arguments.[4] MetLife, the *Horton* plaintiffs, and the Florida Commissioner of Insurance all appeared through counsel and argued in favor of the settlement.

The Coulters contended that Pennsylvania residents somehow were not similarly situated to the remainder of the settlement class and should be excluded from the *Horton* settlement. The Coulters purported to base their arguments on the requirements of due process and Fed. R. Civ. P. 23. Neither the Coulters nor any other objector, however, contended that the settlement violated "judicial comity, States' sovereignty, [or] the McCarran-Ferguson Act," as they now argue in their Petition. [Pet. i; *see* Pet. App. 101a; R. 4-78-1.][5]

On October 25, 1994, the district court issued an order and final judgment under Fed. R. Civ. P. 54(b), accompanied by detailed findings of fact and conclusions of law, approving the settlement. [App. 48a.] The court rejected the Coulters' objections to the settlement [App. 59a, ¶ 39], including their

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4. The Coulters' objection [R. 5-119-1] simply incorporated the papers they had filed in support of their motion to "intervene." *See infra* Part D.

5. The Coulters contended that the McCarran-Ferguson Act barred the *Horton* plaintiffs' federal RICO claim [Pet. App. 111a; R. 4-78-7], but they never even suggested that the Act directly precluded the district court from exercising jurisdiction over and settling the state-law claims. As the district court correctly held, MetLife's McCarran-Ferguson Act defense goes to the merits of the RICO claim, not to the district court's subject matter jurisdiction to decide the claim or to adjudicate any other aspect of the case. [App. 57a, ¶ 32.]

argument that due process required the exclusion of Pennsylvania residents from the settlement [App. 26a, ¶ 53].

Neither the Coulters nor anyone else appealed from the final judgment or the order approving the settlement. Indeed, one of the Coulters' notices of appeal expressly stated that "[t]his is *not* an appeal from the Court's Order approving the Horton Class settlement." [App. 69a (emphasis added).]

D. The Coulters' Motion to "Intervene"

On May 20, 1994, after notice was sent to the *Horton* settlement class but before the hearing on settlement approval, the Coulters moved to "intervene" in this action, asserting that Pennsylvania residents' claims were not "typical" of those of the other class members. [Pet. App. 101a]. The Coulters asked the district court (*i*) to "sever" all Pennsylvania residents from the settlement class so the Coulters could seek to represent them in their putative class action in Pennsylvania or, alternatively, (*ii*) to allow the Coulters to "retain" their own counsel on behalf of the Pennsylvania members of the *Horton* class. [*Id.* 112a.]

Contrary to their assertion in the Petition [Pet. 4, 6], the Coulters never asked the district court to establish a "subclass" of the *Horton* class. [*See* Pet. App. 101a.][6] Nor did they argue that "judicial comity, States' sovereignty, [or] the McCarran-Ferguson Act" [Pet. i] precluded the federal court from approving a settlement of the *Horton* plaintiffs' state-law claims.

The district court heard argument on the Coulters' "intervention" motion at the settlement hearing and orally denied it. On October 25, 1994, the day it approved the settlement, the court issued an order [App. 5a], accompanied by detailed findings of fact and conclusions of law [App. 9a], denying the Coulters'

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6. The Coulters did, however, refer to a so-called "subclass" in their Pennsylvania putative class action.

"intervention" motion as well as motions filed by certain other would-be intervenors who did not appeal.

The court found that the Coulters, as settlement class members, had a legally protectable interest in the action. However, the court concluded that the Coulters could not intervene as of right under Fed. R. Civ. P. 24(a) because (*i*) disposition of the action would not impair or impede their interests, as the Coulters could adequately protect themselves either by opting out and litigating separately or by remaining in the class and objecting to the settlement, and (*ii*) the Coulters were adequately represented by the *Horton* plaintiffs, who asserted the same interests. [App. 23a-24a, ¶¶ 43-47.][7]

The court also concluded that the Coulters lacked standing to move to "sever" other Pennsylvania residents from the class, because the Coulters had no right to speak for anyone but themselves. They therefore could not unilaterally deny other Pennsylvania residents the benefits of the proposed settlement. [App. 25a, ¶ 51.] As the court held, the Coulters

> have not been determined to be adequate representatives of the absent Pennsylvania members of the settlement class (or of any other putative class); nor have their attorneys been found to be adequate class counsel. The Coulters therefore have no right to speak for the putative subclass they allege. [App. 26a, ¶ 52.]

In addition, the court rejected the Coulters' claim that failure to "sever" all Pennsylvania residents from the class would violate those persons' due process rights. [*Id.* ¶ 53.]

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7. As an additional ground for its decision, the court held that the Coulters could not intervene because they had not attached to their motion a pleading setting forth the claims or defenses on which intervention was sought, as required by Fed. R. Civ. P. 24(c). In fact, the Coulters did not assert any claims or defenses at all. [App. 26a, ¶ 54.]

The court exercised its discretion to deny permissive intervention under Fed. R. Civ. P. 24(b), because the procedures for objecting to the settlement or opting out of the class "already offer the Coulters all the relief they seek for themselves and other Pennsylvania settlement class members." [App. 29a, ¶ 64.] Permissive intervention "thus would serve no purpose." [*Id.*]

E. The Motions for Late Exclusion

After the district court orally denied the Coulters' "intervention" motion at the July 18, 1994 hearing, the Coulters' attorney for the first time asked the district court to exclude his clients from the settlement class, even though the June 13, 1994 opt-out deadline had passed. A written exclusion request followed on September 21, 1994. At various other times after June 13, 1994, the other Late Exclusion Movants, represented by the same attorneys who represent the Coulters, also sought relief from the opt-out deadline. The Coulters and the other movants raised various arguments about an alleged lack or inadequacy of notice and alleged clerical error by their attorneys. But no movant objected on the grounds of "judicial comity, States' sovereignty [or] the McCarran-Ferguson Act." [Pet. i.]

The district court denied the various motions in an order dated October 25, 1994, concluding that none of the Late Exclusion Movants had established excusable neglect under Fed. R. Civ. P. 6(b)(2) for not filing timely exclusion requests. [App. 32a]. The court noted that allowing late opt-outs would severely prejudice MetLife's rights under the Settlement Agreement and that the movants would suffer little or no prejudice by remaining in the class, because MetLife had offered to allow them to file late proofs of claim to participate in the settlement and obtain full restitution plus interest. [App. 33a-34a.]

F. The Motion for a Declaration as to Class Membership

On September 21, 1994, the Declaration Movants, represented by the same attorneys who represent the Coulters, moved the district court for a declaration that they were not members of the settlement class. The motion, which was not supported by affidavits or other evidence in the record, was based on counsel's assertion that the movants had not received notice of the action and on a number of factual arguments about the alleged circumstances in which the movants had purchased their MetLife insurance policies. Once again, the motion said absolutely nothing about "judicial comity, States' sovereignty [or] the McCarran-Ferguson Act." [Pet. i.]

The district court recognized that "whether a policyholder is a class member is a fact-specific inquiry that must be accomplished on a case-by-case basis." [App. 43a.] The court therefore denied the Declaration Movants' motion without prejudice, appointed a special master, and directed "any petitioner wishing to obtain a declaration of their status in relation to this class action [to] file [with the special master] on or before November 17, 1994, an individual petition making the requisite allegations supported by affidavits or other admissible evidence." [*Id.*] The court also noted that the Settlement Agreement had contemplated the use of a special master to resolve individual class members' disputed claims. [*Id.*]

The Declaration Movants did not present any renewed petitions to the district court or the special master. Nor did they seek reconsideration or object to the reference to the master.

G. The "Remedial Measures" Motion

On October 4, 1994, the Coulters filed another motion, titled "Petition for Injunctive Relief Pursuant to F.R.C.P. 23(d) for Restraint of Improper Communications and For Remedial Measures to Rectify Defendant's Improper Contacts in Violation of Local Rule 4.04, and for Sanctions." The motion, unsupported by affidavits, alleged that two MetLife sales representa-

tives had engaged in "improper" communications with certain potential class members (but not with the Coulters) and stated, without citing evidence, that "MetLife and/or its counsel" were permitting "MetLife and/or its agents" to "sabotage[]" the class notice. [R. 9-188-2, -3.] The Coulters sought broad discovery, new notice to the class, appointment of their attorney as co-counsel for the class, and attorneys' fees. Once again, the motion said not a word about "judicial comity, States' sovereignty [or] the McCarran-Ferguson Act." [Pet. i.]

Both MetLife and the *Horton* plaintiffs (who are the court-appointed class representatives) opposed the motion. Noting the absence of evidentiary support for the Coulters' motion, the district court concluded that it "appears to have been filed for the sole purpose of causing delay, derailing the proposed class action settlement, and generating legal fees for the Coulters' attorney." [App. 46a.] Because it found the petition "unworthy of additional consideration, and because the Coulters and their attorney have consumed already an inordinate amount of the parties' and the Court's resources," the court denied the motion for the reasons stated in the responses filed by the *Horton* plaintiffs and MetLife. [*Id.*] In addition, even though MetLife had not sought sanctions, the court *sua sponte*

> admonish[ed] the Coulters and their attorney . . . [to] remain mindful of the provisions of Rule 11, Federal Rules of Civil Procedure. Rule 11 precludes the filing of superfluous motions for the purposes of wasting valuable resources, perpetuating undue delay, and serving illegitimate self-interests. If applied to the papers filed by the Coulters and their attorney, Rule 11 might well trigger relief markedly different in both effect and object from that which they proposed or contemplated. [App. 46a-47a.]

H. The Appeals

The Coulters, the other Late Exclusion Movants and the Declaration Movants filed notices of appeal to the Eleventh Circuit from the four orders denying their respective motions. [App. 66a, 67a, 68a, 69a.] The Court of Appeals consolidated the four appeals. Neither the petitioners nor any other class member appealed the order certifying the settlement class and approving the settlement. The Court of Appeals thus noted that "[t]he court's approval of the settlement is not an issue in these appeals." [Pet. App. 12a n.6.]

Petitioners' appeals repeated essentially the same arguments raised in the district court. As in the district court, the Coulters relied on due process and Fed. R. Civ. P. 23. They made no reference to "judicial comity," "States' sovereignty" or the McCarran-Ferguson Act. [Pet. i.][8]

The Court of Appeals found all four appeals to be without merit. *First*, the court concluded that the denial of the Coulters' "intervention" motion was proper because the Coulters and their counsel had not been certified as representatives of any purported class of Pennsylvania residents and therefore had no right to speak for such persons. [Pet. App. 15a.]

Second, the Court of Appeals held that the district court had not abused its discretion in denying the Late Exclusion Movants' motion "[b]ecause the Coulters made a tactical decision not to opt out in time, and the other movants failed to meet the 'excusable neglect' standard of Rule 6(b)(2)." [*Id.* 15a-16a.]

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8. In fact, petitioners abandoned their previous argument that the McCarran-Ferguson Act deprived the district court of jurisdiction over the *Horton* plaintiffs' RICO claim. They sought to revive that argument belatedly in their proposed *second* petition for rehearing [App. 34a], which the Court of Appeals denied them leave to file.

Third, the Eleventh Circuit ruled that the order denying the Declaration Movants' motion without prejudice and referring the issue to a special master was interlocutory and unappealable. But in any event, "[a]ssuming for the sake of argument that the disposition is appealable," the Court of Appeals concluded that the district court's order was "entirely reasonable" and "no abuse of discretion." [*Id.* 17a.]

Fourth, the court held that the district court properly had denied the Coulters' "remedial measures" motion because "the Coulters lacked standing to seek the requested relief." [*Id.* 17a.] In addition, the court ruled that even if the Coulters had standing, "the district court did not abuse its discretion in denying the relief because the Coulters failed to demonstrate the alleged misconduct occurred." [*Id.* 17a-18a.]

The Court of Appeals concluded that the appeals "not only lack merit, they are frivolous." The court awarded double costs and attorneys' fees against petitioners. [*Id.* 18a.]

REASONS FOR DENYING THE WRIT

The Petition is entirely improper. None of the issues it seeks to raise in this Court was asserted below, and none of the issues raised and decided below is asserted in the Petition. Accordingly, *no* issues are properly before this Court, and certiorari should be denied for this reason alone. *None* of the considerations in Sup. Ct. R. 10 applies to this Petition for certiorari. In any event, all of the arguments raised here and in the lower courts are without merit, and none of them warrants this Court's attention in this case.

I.

NONE OF THE ISSUES IN THE PETITION WAS RAISED IN THE COURTS BELOW.

Apparently acknowledging the frivolousness of the arguments they asserted in the lower courts, petitioners have now concocted new arguments never raised below. In the lower courts, petitioners raised a variety of contentions based on the Fifth Amendment's Due Process Clause and Fed. R. Civ. P. 23. They now have suddenly attempted to turn this case into one about "judicial comity, States' sovereignty, and the McCarran-Ferguson Act." [Pet. i.] *None* of these issues was raised in the lower courts.

The settlement of this nationwide class action, which was the product of arm's-length negotiations between the *Horton* plaintiffs and MetLife, provides eligible class members with full restitution of all monies paid plus interest, without any deduction for class attorneys' fees. [App. 49a-50a, 56a-57a, ¶¶ 5-6, 25, 28.] Practically from the moment they received notice of the proposed settlement, however, the Coulters and their attorneys have sought to disrupt the federal proceedings in Florida so they might litigate their own putative class action in Pennsylvania.

In the courts below, the Coulters and their counsel raised the meritless argument that Pennsylvania law somehow is so different from the law of other states that a proposed settlement offering full restitution plus interest would be unfair to Pennsylvania residents (who in any event could opt out of the class if they did not like the proposed settlement relief). [*E.g.*, Pet. App. 108a-109a.] The Coulters and other petitioners also raised an equally meritless challenge to the adequacy of class notice and alleged, without evidentiary support, that MetLife had attempted to "sabotage" the class notice through purportedly improper communications with potential class members.

Petitioners thus based their various motions on the provisions of Rule 23 and principles of due process.

No hint of their current argument about "judicial comity," "States' sovereignty" or the McCarran-Ferguson Act can be found either in petitioners' district court papers or in their briefs on the merits of their appeals. Indeed, *not even one* of the cases or federal statutes cited in the Petition appeared in petitioners' opening brief or reply brief in the Court of Appeals. Petitioners' current arguments first surfaced either in the present Petition or in their proposed *second* petition for rehearing in the Court of Appeals, which that court refused to accept.[9]

"It is this Court's practice to decline to review those issues neither pressed nor passed upon below." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 224 (1990); *see* Robert L. Stern *et al.*, *Supreme Court Practice and Procedure* § 6.26 at 344 (7th ed. 1993). Because petitioners did not timely raise any of their present arguments in the lower courts, they have waived those

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9. The district court's order permanently enjoining settlement class members from pursuing related litigation in other forums [Pet. 9; Pet. App. 77a] also was not at issue below. That order was entered on November 8, 1995, after this case was briefed and argued in the Court of Appeals. The order therefore is not part of the record in this case and was not before the Eleventh Circuit.

Petitioners' allegations about a supplemental notice sent to certain class members in August 1996 [Pet. 8, 19] — well after petitioners' appeals were briefed, argued and decided — also are outside the record and were not properly presented to the Eleventh Circuit. In any event, the fact that MetLife notified the district court of an inadvertent error in the original class notice list and volunteered to send new notice to those potential class members inadvertently omitted from the original mailing should have no bearing on the present Petition except in one respect. Petitioner Kamel was a member of the group sent notice in 1996, and she filed an exclusion request within the new opt-out period. She therefore is no longer bound by the class settlement, and the Petition is moot as to her.

arguments, and the Court need look no further to deny their Petition.

II.

NONE OF THE ISSUES LITIGATED BELOW IS RAISED IN THE PETITION.

As the Petition asserts only arguments that were not raised below, it fails to seek review of any of the issues actually litigated in the Court of Appeals. The only issues appealed to and decided by the Eleventh Circuit were the district court's four orders (*i*) denying intervention, (*ii*) denying the motions for late exclusion, (*iii*) denying without prejudice the motion for a declaration of class membership and referring the issue to a special master, and (*iv*) denying the motion for "remedial measures" concerning allegedly improper contacts with potential class members. The argument section of the Petition omits any reference to those orders or to the Court of Appeals' affirmance of them. Because petitioners have not raised any issues relating to those orders, the Petition presents no appellate determination for this Court to review.

The Petition does complain about the district court's separate order certifying the settlement class and approving the settlement. But petitioners did not appeal from that order, and the Court of Appeals expressly did not review it. [Pet. App. 12a n.6.] That order therefore is not before this Court, just as it was not before the Court of Appeals. The decision in *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom. Amchem Products, Inc. v. Windsor*, 65 U.S.L.W. 3338 (U.S. Nov. 1, 1996) (No. 96-270), where the issue of class certification *was* presented to the appellate court, thus is completely irrelevant here.

Moreover, even if petitioners somehow could raise any arguments concerning the propriety of the class settlement, the Court of Appeals' judgment would remain intact. The Eleventh

Circuit did not base its affirmance of the four appealed orders on the separate, unappealed order approving the settlement.

The Court of Appeals affirmed the order denying "intervention" because the Coulters could adequately protect their own interests by opting out or by appearing and objecting (as they in fact did). In addition, the Coulters could not "intervene" for the purpose of "severing" the claims of other Pennsylvania residents, because the Coulters had not been appointed to represent any such persons. [App. 26a, ¶ 52; Pet. App. 15a.] Thus, the Coulters did not meet the requirements for intervention as of right under Fed. R. Civ. P. 24(a), and there was no point in allowing them to intervene by permission under Fed. R. Civ. P. 24(b). [App. 29a, ¶ 64.] These determinations were unrelated to the district court's separate approval of the settlement under Fed. R. Civ. P. 23(e).

The denial of the Late Exclusion Movants' motions also did not depend on the approval of the settlement. None of the motions questioned the propriety of the settlement order or sought to reopen the issue. The district court denied the motions solely because the movants had failed to demonstrate excusable neglect as required by Fed. R. Civ. P. 6(b) [App. 34a-41a], and the Court of Appeals affirmed on the same grounds [Pet. App. 15a-16a].

Nor did the order on the Declaration Movants' motion for a declaration of their class membership involve any analysis of the settlement. The district court simply denied the motion without prejudice and ordered the movants to refile it before a special master, with appropriate evidentiary support for each movant's allegations. The Court of Appeals held that the district court's order was not "final" and therefore was not appealable under 28 U.S.C. § 1291. [Pet. App. 16a.] In the alternative, the court ruled that the order fell within the district court's discretion "to fashion an efficient and economic solution to the problem the movants presented." [*Id.* 17a.]

Finally, the district court's denial of the Coulters' "remedial measures" motion, and the Court of Appeals' affirmance of that order, was based on the Coulters' lack of standing to bring the motion on behalf of absent class members and on the lack of any evidentiary support for their allegations of misconduct. [App. 46a; Pet. App. 17a-18a]. Again, the approval of the settlement simply was not at issue.

Accordingly, despite their insistence that "[i]t is critically important for courts, litigants and insurance regulators across the country to know whether the Eleventh Circuit's decision is right or wrong" [Pet. 10], petitioners have not presented any arguments that would have any impact on the correctness of that court's judgment. The fact-specific, run-of-the-mill procedural issues actually decided by the Court of Appeals — denial of intervention, denial of late opt-out requests, reference to a special master, and denial of "remedial relief" based on a lack of evidence — hold no importance for the future of insurance regulation or policy, or indeed any other area of law. The petition for certiorari should be denied.

III.

THERE IS NO MERIT TO THE ARGUMENTS IN THE PETITION.

Even if the district court's approval of the settlement somehow were before this Court, and even if petitioners somehow could raise for the first time their McCarran-Ferguson Act arguments, those newly invented contentions still would not provide any basis for granting certiorari. Petitioners' arguments are more than wrong; they are frivolous.

Petitioners' arguments boil down to the assertion that the McCarran-Ferguson Act strips federal courts of *subject matter jurisdiction* to decide insurance-related cases and to approve class action settlements involving state-law insurance issues. This contention is plainly incorrect and frivolous as a matter of law. *See, e.g., Dexter v. Equitable Life Assurance Soc'y*, 527 F.2d

233, 237 (2d Cir. 1975) ("The fact that defendant's conduct, by reason of the exemption to the antitrust laws provided by the McCarran-Ferguson Act, does not violate those statutes does not deprive the court of jurisdiction to hear the case").[10] Indeed, federal courts routinely decide cases involving issues of state insurance law. *See, e.g., Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712, 1720 (1996) (noting federal courts' "'virtually unflagging obligation . . . to exercise the jurisdiction given them,'" and reversing order that had remanded insurance-related case to state court based on abstention).

The McCarran-Ferguson Act provides only that federal law does not preempt "any law enacted by any State for the purpose of regulating the business of insurance" unless the federal law specifically relates to the business of insurance. 15 U.S.C. § 1012(b). But the statute nowhere states or implies that a federal court lacks the power to apply the applicable substantive law, whether federal or state law.

Nor does the McCarran-Ferguson Act raise any substantive preemption issue here, because the district court's approval of the class action settlement under Fed. R. Civ. P. 23 is not inconsistent with Pennsylvania insurance law. Although petitioners contend that the settlement approval "override[s]"

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10. *See also United States v. Cavin*, 39 F.3d 1299, 1305 (5th Cir. 1994) (following *Dexter*, and holding that "McCarran-Ferguson does not erect a jurisdictional bar"); *Martin Ins. Agency, Inc. v. Prudential Reinsurance Co.*, 910 F.2d 249, 254 (5th Cir. 1990) (McCarran-Ferguson Act "did not remove diversity jurisdiction from the federal courts in insurance matters"); *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 702 (10th Cir. 1988) (Act "did not intend to divest federal courts of the right to apply state law regarding the regulation of insurers in appropriate diversity proceedings"), *cert. denied*, 489 U.S. 1096 (1989); *Seasongood v. K & K Ins. Agency*, 548 F.2d 729, 731 n.1 (8th Cir. 1977) (dismissal based on McCarran-Ferguson Act is "for failure to state a claim and not for lack of jurisdiction").

state law regulating insurance, they point to nothing in the law of Pennsylvania or any other state that would preclude the settlement of insurance-related disputes. To the contrary, the Pennsylvania Supreme Court has held in an insurance case that "it is fundamental that the law favors settlements." *Gray v. Nationwide Mut. Ins. Co.*, 223 A.2d 8, 13 (Pa. 1966) (quotation marks omitted); *see also Rothman v. Fillette*, 469 A.2d 543, 546 (Pa. 1983) ("Voluntary settlement of civil controversies is in high judicial favor") (quotation marks omitted).

Contrary to petitioners' assertions [Pet. 11], the class settlement does not attempt to "regulate" the sale of insurance policies in Pennsylvania or any other state. Rather, it simply provides for the compromise and settlement of existing claims in exchange for the payment of money or the issuance of new annuity contracts. Nor does the settlement involve any continuing relief applicable to future insurance policy sales; it affects only claims arising from policies purchased by class members before October 31, 1993. [R. 2-35-6.]

In addition, nothing in the settlement precludes state regulators from enforcing state insurance laws and regulations.[11] In fact, the same conduct alleged in the *Horton* complaint was the subject of investigations by and settlements with state insurance regulators in various states. [App. 64a, ¶ 51; R. 13-27, -101, -197.] And the Florida Insurance Commissioner's counsel appeared at the settlement hearing and supported the proposed settlement. Petitioners' argument that the settlement "allows the insurance companies to escape the regulatory schemes and state-

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11. The Eleventh Amendment sovereign immunity concerns of *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), relied on in petitioners' supplemental brief, are completely irrelevant to this case because no state or state official is a defendant here. Moreover, as explained in the text, the district court's orders did not interfere in any way with state regulators' prerogatives or with what petitioners call "state sovereignty."

by-state scrutiny of the insurance commissioners" [Pet. 11] is therefore baseless.[12]

Finally, there is no inconsistency between the settlement relief and the remedies that petitioners claim would have been available to them under Pennsylvania law had they elected to opt out of, or had they been "severed" from, the settlement class. The district court considered and rejected all of the Coulters' arguments [App. 59a, ¶ 39], including their erroneous contention that Pennsylvania law was sufficiently different from laws of other states to require the exclusion of all Pennsylvania residents from the settlement [App. 26a, ¶ 53]. Moreover, the same remedies that petitioners contend were available under Pennsylvania law — "compensatory, statutory, and punitive damages" [Pet. 12] — also were potentially available under the RICO, statutory and common-law claims pleaded in this case. If the settlement for full restitution plus interest was fair and adequate in light of the pleaded claims (and it certainly was), it also was fair and adequate when viewed in light of the possible relief under Pennsylvania law.

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12. Because the settlement in no way interferes with any state's ability to regulate insurance conduct within its borders, petitioners' reliance on certain language in *BMW of North America v. Gore*, 116 S. Ct. 1589 (1996), is misguided. Moreover, petitioners misread *BMW*. That case, which was an individual action litigated in a state court, certainly did not hold that a *federal court* cannot approve a nationwide *class action settlement* involving state-law claims for compensatory and punitive damages. The language that petitioners quote — stating that due-process considerations preclude a state court from punishing out-of-state conduct that was lawful where it occurred, *id.* at 1597 — has nothing to do with "judicial comity" as between state and federal courts, or with the power of federal courts to hear cases involving state-law claims for punitive damages.

For all these reasons, petitioners' contention that the district court failed to respect "[p]rinciples of comity and states' sovereignty" [Pet. 16] is meritless.

IV.

THERE IS NO MERIT TO THE ARGUMENTS THAT PETITIONERS ACTUALLY RAISED BELOW.

As noted above, the Petition does not include any of the issues petitioners raised in the Court of Appeals, and the Eleventh Circuit's rulings thus are not properly before this Court. But even if the Petition had raised those issues, they would not provide any basis for granting certiorari. The rulings of the district court and the Court of Appeals are clearly correct and present no difficult or unsettled legal issues, much less "compelling reasons" for granting certiorari. Sup. Ct. R. 10. The Eleventh Circuit's decision involved a straightforward and uncomplicated application of 28 U.S.C. § 1291's finality requirement, the doctrine of standing, and the procedural rules governing intervention and enlargements of time.

A. The Motion for "Intervention" Was Properly Denied.

In the absence of a statute expressly conferring a right to intervene, an applicant may intervene as of right only if

> the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2). Rule 24(a) requires a would-be intervenor to demonstrate, among other things, a "significantly protectable interest" that would be impaired by a judgment in the action. *Donaldson v. United States*, 400 U.S. 517, 551 (1971) (affirming denial of intervention because would-be intervenor had no "significantly protectable interest" in the action).

The district court and the Court of Appeals correctly concluded that intervention was not necessary to protect the Coulters' interests. The Coulters — like all other potential class members — already had the right to exclude themselves from the settlement class and pursue an action in Pennsylvania, as they allegedly wished to do. Class members who can fully protect their interests by opting out of the class and filing a separate suit have no right to intervene under Rule 24(a), because the pendency of the class action does not "impair or impede [their] ability to protect [those] interest[s]," Fed. R. Civ. P. 24(a)(2). *See, e.g., Roberts v. Heim*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,394, at 92,555 (N.D. Cal. Mar. 30, 1989) (denying intervention to class members because they "can exercise their right to opt out . . . and thereby avoid being bound by the judgment"); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 289 (N.D. Cal. 1976) (denying intervention where class members could protect rights by opting out); *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617, 621 (C.D. Cal. 1969) (denying intervention because consent decree did not affect "the rights of the [applicants] to prosecute their own claims"), *appeal dismissed*, 397 U.S. 248 (1970).

The Coulters did not need to intervene in order to appear through the attorney of their choice and object to the settlement. They already had those rights, which they fully exercised. The Coulters filed numerous, voluminous submissions with the district court; they filed a notice of intention to appear and object to the settlement; their attorney presented his arguments at the July 18, 1994 hearing; and the court fully considered those points before it finally certified the class and approved the settlement. Having chosen to appear and object through their own counsel, rather than exclude themselves from the class, the Coulters cannot claim that the denial of intervention prevented them from protecting their rights. *See, e.g., Webcor Elecs. v. Whiting*, 101 F.R.D. 461, 466 (D. Del. 1984) (denying intervention to shareholders who could object at settlement hearing); *Officers for Justice v. Civil Serv. Comm'n*, 473 F. Supp. 801, 829-30 (N.D.

Cal. 1979) (denying intervention to class members who had had opportunity to object at settlement hearing), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 289, 295 (N.D. Cal. 1976) (same), *aff'd sub nom. Alaniz v. Tillie Lewis Foods*, 572 F.2d 657 (9th Cir.), *cert. denied*, 439 U.S. 837 (1978).[13]

In addition, the Coulters' interests were adequately represented by the court-appointed class representatives and class counsel. As the district court correctly found, "[t]he Coulters' interests are the same as those of the settlement class: they all claim to have been misled by the same types of sales solicitations . . . ." [App. 24a, ¶ 46.] And like the Coulters, the class representatives sought to recover the maximum amount of money from MetLife. "When the party seeking to intervene has the same ultimate objective as a party to the suit, the existing party is presumed to adequately represent the party seeking to intervene unless that party demonstrates adversity of interest, collusion, or nonfeasance." *United States v. Franklin Parish School Bd.*, 47 F.3d 755, 757 (5th Cir. 1995) (quotation marks omitted). The Coulters utterly failed to make any such showing.

Moreover, as the district court and the Court of Appeals concluded, the Coulters had no standing to "intervene" on behalf of any Pennsylvania residents other than themselves. [App. 25a-26a, ¶¶ 51-52; Pet. App. 15a.] No court has appointed the Coulters as representatives of any class or designated their attorney as class counsel. [Pet. App. 15a.] *See, e.g., Resnick v. American Dental Ass'n*, 95 F.R.D. 372, 376 n.6 (N.D. Ill. 1982) ("Before [class] certification . . . the potential class members are not yet 'represented by' counsel."); 2 Carl Robert Aron *et al.*, *Class Actions* § 22:07 at 22 (1987) ("the attorney-client rela-

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13. For the same reasons, the district court did not abuse its discretion in denying permissive intervention under Fed. R. Civ. P. 24(b)(2), because the Coulters could fully protect their interests by opting out or objecting. [App. 29a, ¶ 64.]

tionship is deemed to arise upon and by reason of [class] certification"). The Coulters therefore had no standing to "intervene" to assert the alleged rights of absent putative class members — or to deprive other Pennsylvania residents of the benefits of the settlement without their knowledge or consent. *See, e.g., Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 203-04 (3d Cir. 1993) (discussing class members' right to opt out only on individual basis); *In re Baldwin-United Corp.*, 105 F.R.D. 475, 481 (S.D.N.Y. 1984) (holding that even if residents of particular state "have special or unique state law claims, the Court cannot find that these potential class members should be denied access to settlement information or denied the opportunity to decide for themselves whether or not to opt out of the proposed class"); 3 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 16.16, at 16-90 (3d ed. 1992) ("the decision to exercise the right of exclusion in a [Rule] 23(b)(3) action is an *individual decision* of each class member and may not be usurped by the class representative or class counsel") (emphasis added).

The denial of the Coulters' "intervention" motion thus involved a straightforward application of Fed. R. Civ. P. 24 and the law of standing. The ruling did not involve any difficult or important issues of law that should be decided by this Court.

B. The Denial of the Motions for Late Exclusion Was Within the District Court's Sound Discretion.

The denial of the Late Exclusion Movants' motion also involved a simple, fact-specific application of the Federal Rules of Civil Procedure. Rule 6(b)(2) allows a court, "in its discretion," to extend a time limit established by rule or order "upon motion made after the expiration of the specified period . . . where the failure to act was the result of excusable neglect." Whether the neglect is "excusable" turns on "all relevant circumstances surrounding the party's omission," *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 395 (1993) (applying excusable neglect standard to Fed. R. Bankr. P. 9006(b)), and thus requires a case-by-case exercise of

discretion by the trial court, *see, e.g.*, 2 James W. Moore *et al.*, *Moore's Federal Practice* ¶ 6.08, at 6-84.1 (2d ed. 1996).

The district court here acted well within its discretion under Rule 6(b)(2) in concluding that none of the Late Exclusion Movants had shown that his or her failure to file a timely exclusion request resulted from "excusable neglect." The court carefully weighed (*i*) the parties' interests in finality and in consolidating claims in a single forum against (*ii*) any prejudice to the movants if their requests were denied and their claims were resolved in the class action. [App. 33a-34a.] *See, e.g., National Student Mktg. Litig. v. Barnes Plaintiffs*, 530 F.2d 1012, 1014 (D.C. Cir. 1976) (class member seeking to opt out beyond deadline must "establish excusable neglect sufficient to outweigh the interest in the finality and repose of judicial orders"); *In re VMS Sec. Litig.*, 145 F.R.D. 458, 462 (N.D. Ill. 1992) (same), *aff'd in part and vacated in part*, 21 F.3d 139 (7th Cir. 1994). The court found no excusable neglect and also concluded that the movants would not be substantially prejudiced by the denial of their motion because MetLife had offered to allow them to file claims for full restitution even though the claim-filing period had ended. [App. 33a-34a.]

The Court of Appeals correctly held that the district court's decision, which was based on the facts of the Late Exclusion Movants' individual applications, was not an abuse of discretion. [Pet. App. 15a-16a.] Thus, even if petitioners had raised this issue here, there would be no reason for this Court to review that fact-bound determination, which presents no "important question of federal law" that needs to be settled by this Court. Sup. Ct. R. 10(c).

C. The Order Referring the Motion for a Declaration to a Special Master Is Interlocutory and Unappealable, and in Any Event Was Within the District Court's Sound Discretion.

The Declaration Movants asked the district court for a "declaration that they are not *Horton* Class members." [R. 9-178-1.] However, they did not submit any affidavits or other evidence with their motion papers, even though the declaration they sought required various factual determinations about the nature of their claims and the circumstances of their insurance transactions. The district court therefore dismissed their motion "without prejudice" and directed "any petitioner wishing to obtain a declaration of their status in relation to this class action [to] file on or before November 17, 1994, an individual petition making the requisite allegations supported by affidavits or other admissible evidence." [App. 43a.] The court referred all such petitions to a special master appointed under Fed. R. Civ. P. 53. [*Id.*] Instead of submitting their claims to the special master, the Declaration Movants appealed. [App. 68a.]

"[A] decision is ordinarily considered final and appealable under § 1291 only if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712, 1718 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). Because the district court's denial of petitioners' motion contemplated further proceedings in this case, the Court of Appeals correctly concluded that the ruling was not appealable as a "final decision" under 28 U.S.C. § 1291. [Pet. App. 17a.] *See, e.g., Deckert v. Independence Shares Corp.*, 311 U.S. 282, 290-91 & n.4 (1940) (order referring issue to master is interlocutory and not appealable); *Peters v. Welsh Dev. Agency*, 920 F.2d 438, 439-40 (7th Cir. 1990) (dismissal of complaint without prejudice and subject to reinstatement when plaintiff met specified conditions was interlocutory and not appealable).

Even if the district court's order were appealable, the decision to dismiss the Declaration Movants' unsupported motion without prejudice to renewal before the special master was not an abuse of discretion. It was not unreasonable for the court to instruct the movants to resubmit their motion accompanied by evidentiary support or to ask a special master to determine the individualized, fact-specific issues the motion raised. As the Court of Appeals observed, the district court "simply drew on its inherent power to fashion an efficient and economic solution to the problem the movants presented." [Pet. App. 17a.] This decision is entirely correct — and presents no important issue of law requiring this Court's attention.

D. The Denial of the Motion for "Remedial Measures" Was Within the District Court's Sound Discretion.

On October 4, 1994, 11 weeks after the settlement hearing, the Coulters filed a motion alleging that two of MetLife's approximately 10,000 United States-based sales representatives had made allegedly improper contacts with several potential class members to discourage them from filing claims. Based on those two sales representatives' alleged statements, the Coulters conjured up a nationwide scheme by MetLife to "sabotage" the class notice, and they sought "injunctive relief" against further contacts with class members, "remedial measures" consisting of redoing the entire class notice and appointing the Coulters' attorney as co-counsel for the class, and "sanctions" requiring MetLife to pay the Coulters' attorneys' fees for the motion. [R. 9-188-1.]

The district court denied the motion because (*i*) the Coulters did not claim to have received any allegedly improper communications, and they lacked standing to assert the rights of any other class members, (*ii*) MetLife had taken proper steps to prevent its sales representatives from contacting potential class members about the settlement, and (*iii*) the Coulters had not shown any basis for concluding that MetLife had authorized the sales representatives' statements — which, in any event, were completely harmless. [App. 46a; R. 10-195-1, 10-206-1.] The

Court of Appeals affirmed on the ground that the Coulters themselves "were not affected by the alleged misconduct" and therefore lacked standing to seek relief. [Pet. App. 17a.] The court also held, in the alternative, that the district court had not abused its discretion in denying the requested relief because the Coulters had failed to establish that any alleged misconduct had occurred. [Pet. App. 17a-18a.]

As discussed above in connection with the Coulters' intervention motion, the Coulters have no right to assert claims on behalf of individuals other than themselves. To have standing, persons claiming relief

> must allege and show that they *personally* have been injured, not that injury has been suffered by other, unidentified members of the [alleged] class to which they belong and which they purport to represent. Unless [they] can thus demonstrate the requisite case or controversy between *themselves personally* and [the adverse party], none may seek relief on behalf of himself *or any other member of the class*.

Warth v. Seldin, 422 U.S. 490, 502 (1975) (emphasis added; quotation marks omitted). The Coulters therefore lacked standing to file the "remedial measures" motion.

In any event, the Coulters did not demonstrate any misconduct at all. The Coulters presented no evidence that MetLife encouraged or condoned the alleged contacts between its sales representatives and certain class members. Nor did they present any evidence to support their allegations that the two isolated incidents were part of a purported scheme to influence class members' decisions about whether to participate in the settlement. Indeed, there was nothing at all improper or misleading about the communications, one of which was made even before the proposed class action settlement had been reached.

. Granting the request for new class notice and appointment of the Coulters' attorney as co-counsel for the class would have

delayed the proceedings, increased MetLife's costs, and perhaps even upset the settlement. The district court therefore was entirely justified in concluding that the Coulters' motion was "filed for the sole purpose of causing delay, derailing the proposed class action settlement, and generating legal fees for the Coulters' attorney." [App. 46a.]

In these circumstances, the requested relief was unwarranted, and the district court did not abuse its discretion in denying the Coulters' motion based on the existing record. This fact-based decision does not turn on any important or unsettled issue of federal law justifying a writ of certiorari.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

Statutory and Other Provisions 1a

Order on Motions to Intervene and to Dismiss Notices of Intention to Appear and Object (Oct. 25, 1994) 5a

Findings of Fact and Conclusions of Law Regarding Motions to Intervene and to Dismiss Notices of Intention to Appear and Object (Oct. 25, 1994) 9a

Order [on Late Exclusion Motions] (Oct. 25, 1994) 32a

Order [on Declaration Motion] (Oct. 25, 1994) 42a

Order [on Remedial Measures Motion] (Oct. 25, 1994) . . 45a

Findings of Fact and Conclusions of Law Regarding Fairness of Class Action Settlement (Oct. 25, 1994) 48a

Order [on Clarence Ridgeway's Late Exclusion Motion] (Oct. 25, 1994) 65a

[Putative] Intervenors' Notice of Appeal [from Order on Motion to Intervene] (Aug. 22, 1994) 66a

Notice of Appeal [from Order on Late Exclusion Motions] (Nov. 22, 1994) 67a

Notice of Appeal [from Order on Declaration Motion] (Nov. 22, 1994) 68a

Notice of Appeal [from Order on Remedial Measures Motion] (Nov. 22, 1994) 69a

STATUTORY AND OTHER PROVISIONS

Title 28, United States Code

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Federal Rules of Civil Procedure

Rule 6. Time

. . . .

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them.

. . . .

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403.

When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

McCarran-Ferguson Act
15 U.S.C. §§ 1011-1015

§ 1011. Declaration of policy

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton

Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

§ 1013. Suspension until June 30, 1948, of application of certain Federal laws; Sherman Act applicable to agreements to, or acts of, boycott, coercion, or intimidation

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

§ 1014. Effect on other laws

Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

§ 1015. "State" defined

As used in this chapter, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, Guam, and the District of Columbia.

[Filed October 25, 1994.]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHERRY HORTON, et al.,

Plaintiffs,

vs. **CIV. NO. 93-1849-CIV-T-23A**

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant.

ORDER ON MOTIONS TO INTERVENE AND TO DISMISS NOTICES OF INTENTION TO APPEAR AND OBJECT

Before the Court are the following: (1) a motion to intervene (Docket No. 64) by Julio Gonzalez-Roel, Kevin P. McCarron, John C. Garcia, Vincent P. Beilman, III, and John A. Ferrandes (the "former sales managers"), filed on May 12, 1994; (2) a motion to intervene (Docket No. 77) by Ronald and Anissa Coulter (the "Coulters"), filed on May 23, 1994; and (3) a motion by named plaintiffs Sherry Horton, Joyce Armbruster and Deborah K. Spamer (Docket No. 106) to dismiss the various notices of intention to appear and object to the proposed class settlement filed by the former sales managers (excluding Mr. Ferrandes) (Docket No. 58), by Kevin J. Daxon ("Daxon") (Docket No. 89), and by Daniel Richard Urso ("Urso") (Docket No. 94). These motions were fully briefed (with accompanying affidavits); documents were submitted into the record; and the

Court held a hearing on the motions on July 18, 1994, at which presentations were heard from counsel for the would-be intervenors.

Based on these submissions, and the Court's Findings of Fact and Conclusions of Law Regarding Motions to Intervene and to Dismiss Notices of Intention to Appear and Object Filed by Certain Purported Class Members rendered herewith,

IT IS HEREBY ORDERED that:

1. The motion to intervene (Docket No. 64) by Julio Gonzalez-Roel, Kevin P. McCarron, John C. Garcia, Vincent P. Beilman, III, and John A. Ferrandes is **DENIED**. The proposed complaint for declaratory judgment (Docket No. 65), proposed memorandum in opposition to class certification (Docket No. 66), proposed motion to modify protective order (Docket No. 67), and request to propound discovery (Docket No. 76), which were tendered with the former sales managers' motion to intervene, are **MOOT** in view of the Court's ruling on that motion to intervene.

2. The motion to intervene (Docket No. 77) by Ronald and Anissa Coulter is **DENIED**. The Coulters also filed a notice of intention to appear and object (Docket No. 119) on July 1, 1994. This objection is **UNTIMELY**. Pursuant to Court order, objections and supporting memoranda were due to be filed on or before June 13, 1994. (Docket No. 48, ¶ 10.) The Coulters' objection merely refers back to their motion to intervene and supporting memorandum. Nevertheless, as settlement class members, the Coulters were allowed to appear and object, and these matters were fully argued and considered at the July 18 hearing.

3. The motion to dismiss by named plaintiffs Sherry Horton, Joyce Armbruster and Deborah K. Spamer (Docket No. 106), regarding the various notices of intention to appear and object to proposed class settlement filed by the former sales managers (excluding Mr. Ferrandes), by Kevin J. Daxon and by Daniel Richard Urso, is **GRANTED**. Accordingly, the notice of

intention to appear and object filed by Daxon (Docket No. 89) is **DISMISSED** for lack of standing. The notice of intention to appear and object filed by Urso (Docket No. 94) is **DISMISSED** for lack of standing. The notice of intention to appear and object filed by the former sales managers (Docket No. 58) is **DISMISSED BY STIPULATION** that the former sales managers are not settlement class members.

4. Julio Gonzalez-Roel, Kevin P. McCarron, John C. Garcia, Vincent P. Beilman, III and John A. Ferrandes' motion for permission to examine the Court's appointed expert (Docket No. 100) is **DENIED AS MOOT**.

5. Julio Gonzalez-Roel, Kevin P. McCarron, John C. Garcia, Vincent P. Beilman, III and John A. Ferrandes' motion for leave to file a reply memorandum in support of their motion to intervene (Docket No. 90) is **GRANTED**. The Clerk is directed to file the memorandum attached to the motion.

6. Plaintiffs Sherry Horton, Joyce Armbruster and Deborah K. Spamer's motion to supplement response to motion to intervene (Docket No. 108) is **GRANTED**. The Clerk is advised that the paper shall remain as filed.

7. Patrick Daxon's motion for permission to examine the Court's appointed expert (Docket No. 99) is **DENIED AS MOOT**.

8. Kevin J. Daxon's motion for permission to examine the Court's appointed expert (Docket No. 132) is **DENIED AS MOOT**.

9. Kevin J. Daxon's motion for leave to file a memorandum opposing plaintiffs' and MetLife's memoranda in support of the proposed settlement (Docket No. 124) is **DENIED AS MOOT AND UNTIMELY**.

ORDERED in Tampa, Florida, on October 25th, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

[Caption omitted in printing.] [Filed October 25, 1994.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING MOTIONS TO INTERVENE AND TO DISMISS NOTICES OF INTENTION TO APPEAR AND OBJECT

Before the Court are the following: (1) a motion to intervene (Docket No. 64) by Julio Gonzalez-Roel, Kevin P. McCarron, John C. Garcia, Vincent P. Beilman, III, and John A. Ferrandes (the "former sales managers"), filed on May 12, 1994; (2) a motion to intervene (Docket No. 77) by Ronald and Anissa Coulter (the "Coulters"), filed on May 23, 1994; and (3) a motion by named plaintiffs Sherry Horton, Joyce Armbruster and Deborah K. Spamer (Docket No. 106) to dismiss the various notices of intention to appear and object to the proposed class settlement filed by the former sales managers (excluding Mr. Ferrandes) (Docket No. 58), by Kevin J. Daxon ("Daxon") (Docket No. 89), and by Daniel Richard Urso ("Urso") (Docket No. 94).

These motions were briefed, and affidavits were submitted. The Court heard oral argument at the July 18, 1994 hearing on the fairness of the proposed settlement.[1] Upon consideration of the papers submitted and arguments made, the Court denied the intervention motions and determined that Daxon and Urso do not have standing to object to the proposed set-

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1. The former sales managers moved for leave to file a reply brief in support of their motion to intervene, and they tendered a proposed reply brief with the motion. (Docket No. 90.) Leave to file a reply brief is granted; the reply brief has been considered by the Court. In addition, plaintiffs moved to supplement their response to the motion to intervene. (Docket No. 108.) This motion also is granted, as ordered below, and the supplemental material has been considered by the Court.

tlement.[2] In accordance with and in support of the determinations made at the hearing, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Factual Background

1. Plaintiffs' central allegation in this case is that they and other members of the settlement class purchased whole life insurance policies issued by Metropolitan Life Insurance Company ("MetLife") as retirement and/or other savings plans or vehicles as a result of written or other sales solicitations that allegedly did not fully disclose that the product being sold was life insurance.

2. The complaint in this action was filed in November 1993 and was widely publicized in the press, particularly in the Tampa Bay area.

3. In April 1994, plaintiffs and MetLife agreed to a proposed settlement of this action and entered into a Settlement Agreement.

4. On April 22, 1994, this Court issued its Order with Respect to Class Certification, Notice, and Settlement Hearing (Docket No. 48), certifying a settlement class consisting of:

> all persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or

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2. At the July 18 hearing, counsel for the former sales managers (except Mr. Ferrandes) did not assert their clients' alleged standing to raise their previously filed objections. Instead, counsel spoke only on behalf of Daxon. After the Court's bench ruling on Daxon's lack of standing, however, the parties and the former sales managers stipulated on the record that the former sales managers were not settlement class members.

other solicitations that allegedly did not fully disclose that these plans were life insurance products, from

(a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or

(b) any other sales office of MetLife between January 1, 1990 and October 31, 1993.

5. The April 22 Order also approved forms of individual and publication notice and a proof of claim form. The proof of claim form required settlement class members who sought to make a claim to certify the truth of the following statements:

a. I purchased a MetLife whole life insurance policy that was sold to me as a retirement and/or savings plan or vehicle.

b. At or prior to the time that I made the purchase, I received from a MetLife representative a sales solicitation that did not fully disclose to me that the product I would receive was a life insurance policy.

c. I was misled by this sales solicitation, and I did not understand that I was buying a life insurance policy at the time I bought it.

(Proof of Claim Form at 1.)

Former Sales Managers, Urso and Daxon

6. At the time this action was filed, the former sales managers and Urso were employed by MetLife in Tampa, Florida. Their employment with MetLife later ceased.

7. Daxon has never been a MetLife employee, but he is the brother-in-law of former sales manager McCarron.

8. The former sales managers (except Ferrandes), Urso and Daxon all purchased MetLife whole life insurance policies

during the relevant time periods defined in the Settlement Agreement.

9. The former sales managers (except Ferrandes), Urso and Daxon did not contend they had been misled by the sales solicitations at issue in this case when they purchased their policies. To the contrary, the former sales managers admitted they "were not misled by anyone and knew perfectly well that they were buying whole life insurance." (Docket No. 58, at 11.) Daxon and Urso adopted the objections of the former sales managers (Docket Nos. 89 & 94) and thus make the same admission.

10. The former sales managers moved to intervene and sought leave to file a declaratory judgment complaint. They claimed to have an interest in this action because they allegedly had been accused by plaintiffs and MetLife of engaging in fraudulent and misleading sales practices and "are or may be personally liable for backcharges for commissions received on policies that are refunded under the class settlement." (Docket No. 64, at 4.) The former sales managers also sought to intervene to modify a Protective Order Regarding Confidentiality entered on April 1, 1994 (Docket No. 32), which covered material that MetLife voluntarily had disclosed to settlement class counsel during settlement negotiations.

11. Together with their intervention motion, the former sales managers also filed with the Court substantial discovery demands addressed to MetLife and plaintiffs, including Interrogatories and Requests for Production of Documents. (Docket No. 76.)

12. During the pendency of this action, the former sales managers filed suit against MetLife and others in the Thirteenth Judicial Circuit, Hillsborough County, Florida, Case No. 94-03445, making allegations similar to those they seek to assert by intervening in this action. (Docket No. 108.)

13. During the pendency of this action, Urso also filed suit against MetLife and others, alleging defamation and other claims, in the Thirteenth Judicial Circuit, Hillsborough County, Florida, Case No. 94-03752.

The Coulters

14. The Coulters are the named plaintiffs in an action originally filed on or about March 25, 1994, in the Court of Common Pleas of Allegheny County, Pennsylvania, but now pending after removal in the United States District Court for the Western District of Pennsylvania, Civil Action No. 94-0629. (Their complaint is attached as Exhibit 2 to Docket No. 77.)

15. The Coulters' Pennsylvania action asserts, *inter alia*, claims on behalf of a putative "subclass" of Pennsylvania residents who allegedly were solicited to purchase MetLife whole life insurance policies as savings and/or retirement plans. These allegations are substantially the same as those asserted by plaintiffs in this action.

16. The Coulters did not file a proposed complaint with their intervention motion, as required by Fed. R. Civ. P. 24(c). Instead, they sought to have "all Pennsylvania residents . . . severed [from this action] and allowed to proceed, with the Coulters as Class Representatives, in Pennsylvania, as a separate class action" against MetLife. Alternatively, the Coulters asked "that they be permitted to retain Pennsylvania counsel to protect their rights under Pennsylvania law." (Docket No. 77, at 1-2.)

17. The Coulters have not yet moved for class certification in Pennsylvania. Nor have they sought to have their attorney appointed as class counsel. MetLife has filed a motion to dismiss the Coulters' amended complaint, and that motion is pending before the federal district court in Pennsylvania.

18. As of June 8, 1994, approximately 800 Pennsylvania settlement class members had filed proofs of claim, even though the deadline for filing was not until June 30, 1994.

19. The Coulters asserted that, in January or February 1993, they purchased a MetLife whole life insurance policy that allegedly had been represented as a retirement or savings plan. (Pennsylvania Complaint ¶¶ 30-36.) They also claimed they purchased the insurance in part on the basis of sales solicitations that allegedly "failed to disclose that the solicitation was intended to propose insurance . . . ." (*Id.* ¶¶ 31-32.) These allegations place the Coulters, as individuals, within the settlement class certified by this Court.

Timing of Intervention Motions

20. Before the former sales managers and the Coulters filed their intervention motions on May 12 and 23, respectively, plaintiffs and MetLife had already entered into a settlement agreement, and this Court had preliminarily approved that agreement as sufficiently reasonable, adequate and fair to warrant notice to members of the settlement class. Following entry of the Court's April 22, 1994 Order granting preliminary approval, individual notice and claim forms were mailed to approximately 71,000 potential settlement class members, and notice was published in newspapers and magazines with a combined circulation in excess of 7 million. (Docket No. 144, 149.)

CONCLUSIONS OF LAW

Intervention as of Right

21. Absent an express statutory right to intervene (which the would-be intervenors do not assert), an applicant may not intervene as of right under Fed. R. Civ. P. 24(a)(2) unless:

> (1) the application to intervene is timely; (2) the applicant has an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that the disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) the applicant's interest will not be represented adequately by the existing parties to the suit.

ManaSota-88, Inc. v. Tidwell, 896 F.2d 1318, 1321 (11th Cir. 1990).

22. An applicant must meet all four criteria to intervene under Rule 24(a)(2). *Id.*; *accord Washington Elec. Coop., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 96 (2d Cir. 1990). The Court has considered each of the four factors as follows.

The Former Sales Managers

23. ***Interest***: Rule 24(a)(2)'s "interest" criterion requires that a would-be intervenor "possess a direct, substantial, legally protectable interest in the proceeding and . . . be at least a real party in interest in the transaction which is the subject of the proceeding." *ManaSota-88, Inc.*, 896 F.2d at 1321 (quotations omitted); *accord United States v. South Fla. Water Mgmt. Dist.*, 922 F.2d 704, 707 (11th Cir.), *cert. denied*, 112 S. Ct. 407 (1991). The purported interest also must be "relat[ed] to the property or transaction which is the subject of the action." Fed. R. Civ. P. 24(a)(2).

24. The Court concludes that the two alleged interests the former sales managers purportedly seek to protect — avoiding "backcharges" and preserving their reputations against allegations they say indirectly reflect on them — are not "relat[ed] to the property or transaction which is the subject of the action." Fed. R. Civ. P. 24(a)(2). The claims in this case concern transactions between MetLife and members of the settlement class arising from sales solicitations that allegedly did not fully disclose that the product being sold was life insurance. This case does not concern the former sales managers' and MetLife's relationships *inter se*; nor is it about the former sales managers' reputations.

25. The former sales managers' introduction of irrelevant allegations involving their compensation arrangements with MetLife, their personal reputations and other matters would raise numerous complicated factual and legal questions that have not been, and need not be, addressed or resolved in this action.

Plaintiffs' "complaint define[s] the general scope of the action and [movants] cannot now by intervention radically alter that scope to create a much different suit." *Washington Elec. Coop., Inc.*, 922 F.2d at 97 (denying intervention where movant would raise new issues); *accord Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 638, 640 (1st Cir. 1989); *Morgan v. Sears, Roebuck & Co.*, 124 F.R.D. 231, 233 (N.D. Ga. 1988).

26. Similarly, this action does not implicate the former sales managers' alleged interest in protecting their professional reputations. If the former sales managers believe they were defamed, and if such alleged defamation is legally cognizable, they may seek to pursue such claims at another time and in another proceeding — as they in fact have done. *See New York News, Inc. v. Newspaper & Mail Deliverers' Union*, 139 F.R.D. 291, 293 (S.D.N.Y. 1991) (denying nonparty's motion to intervene to seek Rule 11 sanctions for allegedly defamatory statements, and holding that appropriate remedy was defamation action, not intervention), *aff'd sub nom. New York News, Inc. v. Kheel*, 972 F.2d 482 (2d Cir. 1992).

27. The former sales managers' alleged interest in preventing the purported "solicitation" of "defamatory statements" in the proof of claim forms sent to potential settlement class members also provides no basis for intervention. The claim forms, which this Court previously approved, do not solicit defamatory statements about the former sales managers or presuppose the existence of misrepresentations by them or by anyone else. They ask only *whether* the policyholders received the type of sales solicitation at issue and *whether* the policyholders were misled as a result.

28. The former sales managers' suggestion that the forms will encourage settlement class members to fabricate alleged misrepresentations is baseless. Settlement class members who seek to make a claim not only must sign the claim form but also must swear to the accuracy of their responses before a notary or other competent officer. These claim procedures cannot

reasonably be said to solicit false or defamatory statements. Moreover, settlement class members' statements on claim forms are absolutely privileged and not defamatory. *See Fridovich v. Fridovich*, 598 So. 2d 65, 66 (Fla. 1992).

29. Not only are the former sales managers' alleged "interests" unrelated to and unaffected by this case; they also are too hypothetical to be cognizable under Rule 24(a)(2). The former sales managers admit that their alleged liability for "backcharges" is merely "potential." (Docket No. 65, Proposed Intervention Complaint ¶ 20.) An interest that is "purely a matter of speculation" because it is contingent on some possible future action or event cannot support intervention under Rule 24. *ManaSota-88, Inc.*, 896 F.2d at 1322; *accord Travelers Indem. Co.*, 884 F.2d at 638; *Washington Elec. Coop., Inc.*, 922 F.2d at 97; *Arizona v. Motorola, Inc.*, 139 F.R.D. 141, 146 (D. Ariz. 1991).

30. The former sales managers' claimed interest in their reputations also is too hypothetical to support intervention. Settlement class members have not been asked to make defamatory statements about the former sales managers in the proofs of claim, and there is no basis for expecting them to do so.

31. ***Impairment of Interest***: Even if the former sales managers' alleged interests in avoiding "backcharges" and protecting their reputations were cognizable and sufficiently related to this case, the Court would conclude that "the disposition of the action [would not] impede or impair [their] ability to protect [those] interest[s]." Fed. R. Civ. P. 24(a)(2). The former sales managers, in fact, already have filed a state court action raising issues relating to their alleged interests.

32. Neither the settlement of this action nor its litigation would determine whether the former sales managers were defamed or whether they can be "backcharged." Because none of the former sales managers' purported "interests" would be adjudicated, the former sales managers' ability to protect those

"interests" would not be impaired by a denial of intervention. *See, e.g., Morgan*, 124 F.R.D. at 233 (denying clothing manufacturer's motion to intervene in products liability action that would not determine whether it had made allegedly defective product).

33. Moreover, the former sales managers would not be bound by the disposition of the claims before this Court because they do not assert such claims, are not parties to the action (or settlement) and are not in privity with any party. *See, e.g., Martin v. Wilks*, 490 U.S. 755, 761-62 (1989) (nonparties not bound by consent decree); *South Fla. Water Mgmt. Dist.*, 922 F.2d at 709 (without intervention, nonparty cannot be bound). Nor would the former sales managers be bound as settlement class members because, as stipulated, they are not members of the settlement class. *See, e.g., In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 343 (N.D. Ga. 1993) (nonmember of class cannot be bound and lacks standing to object to settlement).

34. Where, as here, a would-be intervenor will not be bound by disposition of the main action and can adequately protect his alleged "interest" in an independent suit, intervention as of right should be denied. *E.g., Worlds v. Department of Health & Rehab. Servs.*, 929 F.2d 591, 594-95 (11th Cir. 1991) (denying intervention where applicants had filed separate suit); *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617, 621 (C.D. Cal. 1969) (denying intervention because consent decree did not affect "the rights of the [applicants] to prosecute their own claims"), *appeal dismissed*, 397 U.S. 248 (1970); *see also ManaSota-88, Inc.*, 896 F.2d at 1323.

35. ***Adequacy of Representation***: The Court concludes that the third Rule 24(a)(2) factor — whether the existing parties will adequately represent the movants' interests — also cannot justify the former sales managers' intervention. Implicit in this requirement is the assumption that the former sales managers actually have a cognizable interest capable of being impaired or impeded by this action. As discussed above, however, the former

sales managers' own claims against and relationship with MetLife are not at issue in this case. Whether the former sales managers' alleged interests are adequately represented thus is irrelevant at this time. Moreover, to the extent the former sales managers allegedly have any direct interests as against third parties, those interests are the same as MetLife's: the former sales managers and MetLife can both be expected to seek to restrict settlement class relief to those persons who are eligible to receive it. These interests thus are adequately represented by MetLife, even if the former sales managers and MetLife might have different litigation strategies and different motives. *See, e.g., Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 205 (7th Cir. 1982) (representation adequate because "existence of an adversary relationship between the company and the [movants] with respect to [movants'] share of the profits is surely no deterrent to the maximization of the profits"); *see also Washington Elec. Coop., Inc.*, 922 F.2d at 98; *Pierson v. United States*, 71 F.R.D. 75, 80 (D. Del. 1976).

36. ***Timeliness***: This Court must consider four factors in assessing an intervention motion's timeliness:

> (1) the length of time during which the intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case; (3) the extent of the prejudice that the would be intervenor may suffer if his petition for leave to intervene is denied; [and] (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.

Reeves v. Wilkes, 754 F.2d 965, 968-69 (11th Cir. 1985); *accord United States v. Jefferson County*, 720 F.2d 1511, 1516 (11th

Cir. 1983). The Court concludes that the former sales managers' intervention motion is untimely under each of these four factors.

37. First, substantial delay occurred between the time the former sales managers knew or should have known of their alleged interest in this case and the time they moved to intervene. The former sales managers were still employed by MetLife in Tampa when this action was filed -- with considerable attendant publicity in the national and regional press — in November 1993. The Court therefore concludes that the former sales managers either actually knew or certainly should have known about this case and the requested relief at least six months before they moved to intervene. Their decision to defer attempted intervention until after the parties had executed the Settlement Agreement, obtained preliminary approval from this Court and sent notice to the settlement class suggests unexcusable delay and is sufficient reason to deny intervention. *See, e.g., Reeves*, 754 F.2d at 969-70 (where suit against would-be intervenors' employer was publicized in local newspapers, they should have known of its pendency and should have moved to intervene sooner); *Jefferson County*, 720 F.2d at 1516 (intervention denied where movants "knew at an early stage in the proceedings that their rights could be adversely affected"); *see also United States by Bell v. Allegheny-Ludlum Indus., Inc.*, 553 F.2d 451, 453 (5th Cir. 1977), *cert. denied*, 435 U.S. 914 (1978). The former sales managers' argument that they could not have known of their alleged interest in these proceedings until their employment with MetLife ceased in the spring of 1994 is baseless for at least two reasons: (*i*) plaintiffs' November 1993 complaint itself sought restitution and rescission of the insurance policies that the former sales managers now claim might lead to "backcharges," and (*ii*) the lawsuit and complaint received extensive publicity in Tampa and elsewhere.

38. Second, allowing the former sales managers to intervene at this late date would cause substantial and unwarranted prejudice to the existing parties. The former sales

managers did not file their motion until after the parties had devoted much time, effort and expense to (*i*) negotiating a settlement agreement, (*ii*) obtaining this Court's preliminary approval of the settlement proposal, (*iii*) mailing individual notice of the proposed settlement to some 71,000 potential settlement class members, (*iv*) publishing additional notice in newspapers and magazines throughout the country, and (*v*) retaining a professional claims administrator to answer potential settlement class members' questions and process thousands of proofs of claim. Allowing the former sales managers to intervene at this relatively late date would inject many new and unrelated questions into the case and would delay and disrupt the pending settlement proceedings, which await only final Court approval. This delay would severely prejudice the parties' interests in implementing the relief outlined in the Settlement Agreement and in providing a prompt, efficient and equitable resolution without the attendant costs, risks and burdens of further litigation. *See, e.g., Campbell v. Hall-Mark Elec. Corp.*, 808 F.2d 775, 779 (11th Cir. 1987) (denying application because intervention "would significantly prejudice the existing parties, primarily because of the delay to the plan participants . . . who have elected to take the settlement offer"); *Reeves*, 754 F.2d at 971 (denying motion because, "if intervention is allowed, time and effort expended in formulating the settlement . . . will be for naught"); *Jefferson County*, 720 F.2d at 1517 (denying motion because untimely intervention "would plainly have prejudiced the existing parties, since it would have nullified [their] negotiations").

39. Third, denial of intervention would not prejudice the former sales managers because (*i*) they have no interest in the substance of this action, (*ii*) they will not be bound by its outcome and (*iii*) they may raise their claims in their state court action, which already asserts essentially the same allegations the former sales managers seek to raise here. *See, e.g., Campbell*, 808 F.2d at 779 (no prejudice where applicant "may continue to litigate his own case in pursuit of whatever broader public policy interests he deems important"); *Reeves*, 754 F.2d at 971 (no

prejudice where applicants "could alternatively institute an independent lawsuit and assert the specific violations of their rights"); *Jefferson County*, 720 F.2d at 1517-19 (no prejudice where movants could institute independent suit and would not be bound by outcome of action in which they sought to intervene).

40. Fourth, other unusual circumstances here also disfavor intervention as untimely. The former sales managers have claimed that, if (and only if) they are allowed to intervene, a conflict of interest would arise that would disqualify some or all of the law firms representing the parties. An attempt to disqualify counsel at this late stage of the case would cause substantial delay and prejudice to the parties. In addition, the former sales managers have sought to take extensive discovery from MetLife and the settlement class representatives in connection with their intervention motion. This discovery also would cause substantial and unjustifiable delay and prejudice to the parties and the Court.

41. The former sales managers therefore have not satisfied any of Rule 24(a)(2)'s four requirements for intervention as of right.

The Coulters

42. The Court next considers the four Rule 24(a)(2) requirements in connection with the Coulters' motion to intervene.

43. ***Interest and Impairment of Interest***: Because the Coulters are settlement class members, they have a legally protectable interest in the subject of this action. This Court's April 22, 1994 Order, however, allowed the Coulters — and any other dissatisfied Pennsylvania residents within the settlement class — to opt out of the settlement class and litigate elsewhere if they chose to do so. Thus, the Coulters and other Pennsylvania residents cannot claim that the disposition of this action would unduly impede or impair their interests if intervention were denied. *See, e.g., Roberts v. Heim*, [1989] Fed. Sec. L. Rep.

(CCH) ¶ 94,394, at 92,555 (N.D. Cal. Mar. 30, 1989) (denying intervention to class members because they "can exercise their right to opt out . . . and thereby avoid being bound by the judgment"); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 289 (N.D. Cal. 1976) (same).

44. In the alternative, the Court's order gave the Coulters the opportunity to remain in this class action and object to the settlement, and to appear at the fairness hearing themselves or through their own attorney. *See* Fed. R. Civ. P. 23(c)(2)(c). The Coulters appeared through their own attorney at the fairness hearing.

45. As settlement class members, the Coulters already had the right to opt out of the settlement class or appear through counsel. Thus, denial of the intervention motion would in no way prevent them from protecting their rights. *See, e.g., Webcor Elec. Inc. v. Whiting*, 101 F.R.D. 461, 466 (D. Del. 1984) (denying intervention to shareholders because they could object at fairness hearing); *Officers for Justice v. Civil Serv. Comm'n*, 473 F. Supp. 801, 829-30 (N.D. Cal. 1979) (denying intervention to class members who had opportunity to object at fairness hearing), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 289, 295 (N.D. Cal. 1976), *aff'd sub nom. Alaniz v. Tillie Louis Foods*, 572 F.2d 657 (9th Cir.), *cert. denied*, 439 U.S. 837 (1978).

46. ***Adequacy of Representation***: The Court also rejects the Coulters' argument that plaintiffs cannot or will not adequately represent their interests. The Coulters' interests are the same as those of the settlement class: they all claim to have been misled by the same types of sales solicitations used to sell whole life insurance as retirement and/or savings plans or vehicles.

47. Nor can the Coulters justify their motion by arguing that their claims are factually and legally distinct from those in

this action and that Rule 23(a)'s requirements of commonality, typicality and adequacy of representation are not satisfied as to the putative subclass they allege. These contentions ignore that the parties have presented the Court with a *settlement* and that Rule 23's requirements "may be more easily satisfied in the settlement context than in the more complex litigation context." *Dalkon Shield Claimants Comm. v. Aetna Cas. & Sur. Co. (In re A.H. Robins Co.)*, 85 B.R. 373, 378 (E.D. Va. 1988), *aff'd*, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989); *see also Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 157-58 (S.D. Ohio 1992).

48. ***Timeliness:*** The Court questions whether the Coulters' intervention motion is timely under the factors articulated in *Reeves*, 754 F.2d at 968-69. The Coulters filed their Pennsylvania action on or about March 25, 1994; they therefore knew of their claims before that date. Moreover, in light of the extensive national publicity that this case and MetLife's sales solicitations received, the Coulters quite likely knew or should have known about this action when they filed their Pennsylvania suit. Yet the Coulters did not move to intervene here until May 23 — well after the Court had preliminarily approved the proposed settlement and individual notice had been mailed to potential settlement class.

49. The Court need not decide, however, whether the Coulters' intervention motion was timely because the motion fails to satisfy two of the other four Rule 24(a)(2) requirements: impairment of interest and inadequacy of representation. As discussed above, a prospective intervenor must meet *all four* of those requirements to intervene as of right. *ManaSota-88, Inc.*, 896 F.2d at 1321; *accord Washington Elec. Coop., Inc.*, 922 F.2d at 96. In addition, denial of intervention would in no way prejudice the Coulters because (*i*) they had an opportunity to exclude themselves from the settlement class or object to the proposed settlement and (*ii*) they actually entered an appearance in this case.

50. The Court therefore concludes that the Coulters cannot intervene as of right because they have not met Rule 24(a)(2)'s requirements. Moreover, their motion is defective for several other reasons.

51. ***Asserted Right to Represent Other Pennsylvania Residents:*** The Coulters' attempt to exclude all Pennsylvania residents from the settlement class is improper. Just as the Coulters had the right to participate in or opt out of the settlement class, so did every other settlement class member who resides in Pennsylvania. The Coulters have no authority unilaterally to make that decision for all other Pennsylvania settlement class members. *See* 3 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 16.16 at 16-90 (3d ed. 1992) ("The decision to exercise the right of exclusion in a Rule 23(b)(3) action is an *individual decision* of each class member and may not be usurped by the class representative or class counsel") (emphasis added). The type of group or mass opt-out that the Coulters seek therefore is improper — especially where so many Pennsylvania residents already have filed claim forms expressing their desire to participate in the proposed settlement. *See, e.g., Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 203-04 (3d Cir. 1993) (discussing class members' right to opt out only on an individual basis, and noting that "a mass opting out . . . clearly would be disruptive to the district court's ongoing settlement management").

52. The Coulters' attempt to "sever" or exclude all Pennsylvania residents from the settlement class also is particularly inappropriate because the Coulters have not been determined to be adequate representatives of the absent Pennsylvania members of the settlement class (or of any other putative class); nor have their attorneys been found to be adequate class counsel. The Coulters therefore have no right to speak for the putative subclass they allege or to force the putative subclass members' withdrawal from the settlement class certified in this action.

53. ***Due Process*:** The Coulters' claim that this Court's application of Florida law to Pennsylvania residents would violate due process is unfounded. The Court has not applied Florida law to Pennsylvania residents' claims; nor has it attempted to adjudicate the merits of plaintiffs' claims. The only issue before the Court is the fairness and adequacy of the settlement — an issue controlled by *federal* law governing settlement class certification and settlement approval. The Court therefore does not need to resolve the constitutional limits on the application of state choice-of-law principles. In addition, if the Coulters and other Pennsylvania residents believed that Pennsylvania law gave them a greater potential recovery than would be available to other settlement class members, they could have excluded themselves from the settlement class.

54. ***Procedural Defect*:** Intervention also is denied because the Coulters did not attach a pleading as required by Rule 24(c) "setting forth the claim or defense for which intervention is sought." The failure to attach a pleading is especially significant here because the Coulters do not even attempt to assert a claim or defense; rather, they seek to intervene so they can "sever" themselves and all other Pennsylvania residents from the case.

Permissive Intervention

55. Where an applicant may not intervene as of right under Rule 24(a)(2), the Court nevertheless has discretion to permit intervention under Rule 24(b)(2) if the application is timely *and* if

> an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b)(2); *see, e.g.*, *ManaSota-88, Inc.*, 896 F.2d at 1323.

56. "[I]t is wholly discretionary with the court whether to allow intervention under Rule 24(b) and even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied, the court may refuse to allow intervention." *Worlds*, 929 F.2d at 595 (quotations omitted).

The Former Sales Managers

57. As discussed above, the Court concludes that the former sales managers' application is untimely and prejudicial. This reason alone justifies denying intervention under Rule 24(b)(2) as well as Rule 24(a)(2).

58. In addition, the former sales managers cannot meet the other Rule 24(b)(2) criteria, and the numerous collateral issues and attendant delay that would result from their intervention also militate against granting the motion.

59. The former sales managers' "claims and defenses" have nothing in common with the issue presently before the Court: the fairness of the settlement. In fact, the only claims the former sales managers have asserted are entirely *different* from those averred in plaintiffs' complaint; they are irrelevant and hypothetical at best. Nor have the former sales managers raised any defenses, because no one has asserted any claims against them.

60. Even if the former sales managers could satisfy the other requirements for permissive intervention, the Court nevertheless would exercise its discretion to reject their efforts to introduce wholly irrelevant issues into this proceeding and delay timely implementation of the settlement. Courts routinely refuse to permit intervention where, as here, an applicant "seeks to inject numerous issues into the case." *ManaSota-88, Inc.*, 896 F.2d at 1323; *accord Washington Elec. Coop., Inc.*, 922 F.2d at 98 ("The potential for delay and the complication engendered by the injection of [new] issues justify denial of the motion").

61. Particularly in light of "the strong judicial policy favoring settlement," *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984), this Court will not allow collateral and irrelevant issues to delay or jeopardize the proposed settlement. *See, e.g., Farmland Dairies v. Commissioner of N.Y. State Dep't of Agriculture & Markets*, 847 F.2d 1038, 1044 (2d Cir. 1988) (denying intervention because, "if [movants] were permitted to intervene at this late date, there is no question that the settlement concluded by [the original parties] would be jeopardized"); *Motorola, Inc.*, 139 F.R.D. at 147; *Automobile Mfrs. Ass'n*, 307 F. Supp. at 620.

62. The former sales managers also threaten to try to disqualify some or all of the attorneys representing the parties based on alleged conflicts of interest that would arise only if intervention were permitted. This is yet another a reason to deny intervention. *See Davis v. Southern Bell Tel. & Tel. Co.*, 149 F.R.D. 666, 672 (S.D. Fla. 1993) (intervention denied because it would create conflict of interest warranting disqualification of certain counsel).

63. Similarly, the former sales managers have requested discovery that would substantially delay the resolution of this action. The Court denies intervention for this reason as well. *See, e.g., H.L. Hayden Co. v. Siemens Medical Sys., Inc.*, 797 F.2d 85, 89 (2d Cir. 1986) (denying intervention because discovery by movant would cause undue delay); *Morgan*, 124 F.R.D. at 233.

The Coulters

64. As discussed above, the Coulters' intervention motion might be untimely. But more importantly, the procedures adopted by the Court for potential class members to object or exclude themselves from the settlement class already offer the Coulters all the relief they seek for themselves and other Pennsylvania settlement class members. Granting permissive intervention thus would serve no purpose where the would-be

intervenors wish only to "sever" themselves from the action and already have the right to do so. (As discussed above, however, the Coulters' unilateral attempt to "sever" other Pennsylvania settlement class members is improper.)

Standing to Object to Proposed Settlement

65. Urso and Daxon seek to assert a number of objections to the class settlement and the class notice. They lack standing to raise these objections because they are not members of the settlement class and do not assert claims covered by the Settlement. *See, e.g., Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989) ("non-class members have no standing to object, pursuant to a Rule 23(e) notice directed to class members, to a proposed class settlement"), *cert. denied*, 493 U.S. 1058 (1990); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 172 (5th Cir. 1979) (only class members may object to settlement), *cert. denied*, 452 U.S. 905 (1981); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. at 342-43; *In re Sunrise Sec. Litig.*, 131 F.R.D. 450, 459 (E.D. Pa. 1990); *Mashburn v. National Healthcare, Inc.*, 684 F. Supp. 660, 673 (M.D. Ala. 1988).

66. The settlement class certified by this Court includes only those persons who meet all portions of the class definition, including the requirement that they purchased their MetLife whole life insurance policy "as a retirement and/or other savings plan or vehicle, *based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products.*" (Docket No. 48, ¶ 1; emphasis added.) In addition, settlement class members who seek to make a claim must certify on the claim form that they had been misled when they bought their whole life policies.

67. Daxon expressly adopted the former sales managers' objections and, thus, the admission that he "knew perfectly well that [he was] buying whole life insurance." (Docket No. 58, at 11.) On the day of the hearing, his counsel tendered an addi-

tional affidavit, sworn to by Daxon on July 13, 1994, but it does not recant this admission or allege that Daxon was misled.

68. Daxon also has proffered a memorandum to the Court in which he attempts to assert certain additional objections about the adequacy of the notice. (Docket No. 124.) Although Daxon's objections about the notice were not timely made before the June 13, 1994 deadline (even if Daxon had standing to object in the first place), the Court has considered his memorandum.

69. Urso purchased his policy based on his own knowledge of the product involved, not as a result of the alleged sales solicitations that are the subject of this case. Urso also expressly adopted the former sales managers' objections and, thus, the admission that he "knew perfectly well that [he was] buying whole life insurance." (Docket No. 58, at 11.)

70. Urso's principal basis for objecting to the proposed settlement appears to be his contention that "MetLife is attempting to purchase . . . evidence that it can use against Mr. Urso" in the lawsuit he has brought against MetLife. (Docket No. 139, at 3.) Urso presents no evidence to support this assertion.

71. Neither Daxon nor Urso is a settlement class member, and neither asserts claims on behalf of the settlement class. Daxon and Urso therefore have no standing to object to the disposition of those claims as contemplated by the Settlement Agreement. The Court has nevertheless considered their written submissions and heard extensive argument on the objections they wished to make at the July 18 hearing. The Court's findings and conclusions on the objections they assert will be set forth in the Court's separate ruling on the fairness of the proposed settlement.

In Tampa, Florida, on October 25th, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

[Caption omitted in printing.] [Filed October 25, 1994.]

ORDER

The following class members filed requests for enlargement of time within which to seek exclusion from the class ("requests"): John Romano (Doc. 119B), Terrance J. McDonnell (Doc. 119C), Joann Kablach (Doc. 119D), Myrna Lesueur (Doc. 119E), Brian T. Rohm (Doc. 119F), Douglas and Roena Conner (Doc. 119G), Marjorie Palmer (Doc. 119H), Terry A. Palmer (Doc. 199I), Deborah R. Myers (Doc. Doc. 159), Darrin L. Johns (Doc. 160), Anissa and Ronald Coulter (Doc. 174), Jeanne Yokel (Doc. 175), Eric Maharg (Doc. 176), and Albert Darren Wise (Doc. 177) (collectively, the "applicants").

Each of the requests were filed by attorney Kenneth Behrend. The applicants seek to exclude themselves from the class even though they failed to comply with the provisions of the settlement agreement (Doc. 35) and applicable order (Doc. 48). Both the agreement and order require that class members electing exclusion send to the Claims Administrator a "request for exclusion" postmarked on or before June 13, 1994.

None of the applicants questions the need for a deadline or the appropriateness of the June 13, 1994, deadline. The applicants suggest simply that they should be provided additional time to exclude themselves because they have shown "excusable neglect" under Rule 6(b)(2), Federal Rules of Civil Procedure. The excusable neglect standard applies to the requests because they were filed after the expiration of time for seeking exclusion.

The determination of whether the time for exclusion should be enlarged is left to the district court's sound discretion. *See, e.g., Davidson v. Keenan*, 740 F.2d 129 (2d Cir. 1984). "To sustain a finding of excusable neglect, the party seeking the enlargement of time bears the burden of proving both *good faith* and a *reasonable basis* for not complying within the specified period." *Breslow v. Prudential-Bache Props., Inc.*, 1994 WL

478611, *3 (N.D. Ill. Sept. 1, 1994) (emphasis added). The class action deadline serves an important function and should not be disturbed casually. *Id.* For the following reasons, the applicants' requests are **DENIED**.[1]

Before addressing the individual requests, considering the prejudice, if any, the respective parties may suffer by denying the requested relief is worthwhile. In its response (Doc. 190), Metlife offers the applicants the same settlement options that were available initially to them even though the time for submitting a completed proof of claim form has passed.[2] In a separate order, the terms of the settlement agreement, including the cash refund and annuity options, are held fair, reasonable, adequate, and in the best interest of the class members. Therefore, precluding the applicants from opting out of the class at this time will cause

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1. This ruling is based on the merits. In its response (Doc. 190), Metlife seeks denial of the requests based, in part, on procedural grounds. Metlife asserts that the "requests" are fatally defective because they are not styled as "motions." Without citing to any case authority, Metlife suggests that, to give effect to the difference between Rule 6(b)(1), which allows an enlargement of time based simply on a request, and Rule 6(b)(2), which requires a motion, the applicants' papers must be styled as motions. Here, the difference is inconsequential. The parties have been provided an opportunity to respond to the requests regardless of how they are designated. Accordingly, Metlife's procedural argument is unavailing. For purposes of this order, the applicants' requests are construed as motions and denied on the merits. A procedural basis for denying the requests is the applicants' failure to comply with Local Rule 3.01(g). However, in light of Metlife's response (Doc. 190), requiring the parties to confer in good faith appears futile. For this reason, the requests are considered despite the applicants' non-compliance with the Local Rules.

2. Metlife is now bound to offer the applicants the option of either the cash refund or the annuity. Upon entry of this order, the applicants may contact counsel for Metlife to discuss submitting a completed claim form and electing one of the options.

them no cognizable prejudice. In fact, many of the applicants request a cash refund as alternative relief.

On the other hand, allowing class exclusions at this late stage will cause severe prejudice to Metlife. The settlement agreement reflects the parties bargained-for expectations. The opt-out deadline is a material provision of the settlement agreement. That deadline provided Metlife with an opportunity to determine the potential number of claims that may remain unresolved and to evaluate the objections to the proposed settlement. Prior to the fairness hearing, Metlife had the ability to assess that information and, pursuant to the terms of the settlement agreement, to terminate the proposed settlement. Metlife no longer has the right to consider the applicants' claims and decide whether to terminate the agreement.

From Metlife's perspective, a bargained-for purpose of the $76 million agreement is to litigate the asserted claims in one forum and to bring finality to those claims. Allowing untimely exclusions without sufficient cause and forcing Metlife to litigate elsewhere would not only frustrate the purposes of the court-approved settlement and undermine the Court's orders but would be fundamentally unfair to Metlife, which is attempting to resolve all pending claims.

The first group of applicants to be considered are those class members who allege that they failed to submit their requests for exclusion on or before June 13, 1994, because the proof of claim form is allegedly confusing. Their argument is without merit. The class notice, which accompanied the claim form and was approved by this Court, states clearly that a class member, to be excluded from the class, must submit to the Claims Administrator a request for exclusion postmarked on or before June 13, 1994. The claim form, which is equally clear, addresses the procedure for electing the cash refund and annuity options, and not the procedure for opting-out.

As a matter of law, misunderstanding the language of a court-approved class notice and claim form fails to constitute excusable neglect for purposes of Rule 6(b)(2). *See In re VMS Secs. Litig.*, 1992 WL 203832, *3-4 (N.D. Ill. Aug. 13, 1992). If class members needed additional information, they could have contacted class counsel or the Claims Administrator. The class notice specifically informed the class members that those resources were available for free. Alternatively, class members who were unable to understand the class notice or claim form could have consulted with their attorney. *See In re VMS Ltd. Partnership Secs. Litig.*, 26 F.3d 50, 51-2 (7th Cir. 1994).

Accordingly, the requests for enlargement filed by class members Terrance J. McDonnell (Doc. 119C), Myrna Lesueur (Doc. 119E), Brian T. Rohm (Doc. 119F), Douglas and Roena Conner (Doc. 119G), Marjorie Palmer (Doc. 119H), Terry A. Palmer (Doc. 199I), and Albert Darren Wise (Doc. 177) fail to establish excusable neglect and are denied. Except for Wise, each of these applicants requests the cash refund as alternative relief. Inasmuch as Metlife must offer either the cash refund or the annuity, the applicants will be receiving, in part, their requested relief.

Class members Deborah R. Myers and Darrin L. Johns filed their requests for enlargement (Docs. 159 and 160, respectively) on August 8, 1994. In their requests, both Myers and Johns assert that they met with their attorney, Kenneth Behrend, well before the June 13, 1994, deadline and expressed to him their desire to be excluded from the class. Due to some undefined "clerical error," their attorney did not submit requests for exclusion to the Claims Administrator.

The requests for enlargement filed by Myers and Johns fail to establish excusable neglect. Their assertions are not supported by an affidavit or some other admissible evidence. Additionally, assuming the assertions are true, inadvertence of counsel generally fails to constitute excusable neglect. *See, e.g., Davidson v. Keenan*, 740 F.2d 129, 132 (2d Cir. 1984); *Jones v.*

Siegfried Constr. Co., Inc., 105 F.R.D. 491, 492 (W.D.N.Y. 1984), *aff'd*, 792 F.2d 136 (2d Cir.), *cert. den. sub nom. Jones v. Niagara Frontier Transp. Auth.*, 479 U.S. 932, 107 S. Ct. 404 (1986). Myers and John explain neither the alleged "clerical error" nor the eight-week period that lapsed before attempting to correct the error. Accordingly, the requests for enlargement filed by Myers (Doc. 159) and Johns (Doc. 160) are denied.

Joann Kablach's request (Doc. 119D) fails to show excusable neglect. Kablach avers that she was unable to submit a timely request for exclusion because she did not receive a class notice and claim form packet until June 17, 1994. However, Kablach fails to mention that she did not request a packet until June 16, 1994. *See* ¶ 6(c) of Goldsmith Affidavit (Doc. 191). Conspicuously missing from Kablach's request is the date she met with her attorney and learned about the June 13, 1994, deadline. For these reasons, Kablach's request (Doc. 119D) is denied.

In his unverified request (Doc. 176), Eric Maharg states that he failed to submit a timely request for exclusion because he reasonably relied (1) on a form letter and pamphlet that he received from his Metlife sales agent and (2) on alleged representations made by his Metlife sales agent in relation to the pamphlet.

The form letter, dated March 31, 1994, discussed simply the availability of "up-to-date" information regarding Maharg's policy (*e.g.*, current cash value). The pamphlet prepared my Metlife advises policyholders that the controversy over sales practices would not affect the financial security of the company's products. The pamphlet also discusses Metlife's response to investigations by state regulators and the company's financial strength. The purported representation made by Metlife's sales agent allegedly includes assurances that Maharg's policy is unrelated to the policies sold in Florida and suggests that he refrain from taking action in the Florida proceeding.

Maharg's claim of reasonable reliance is without merit.[3] Reliance on a defendant's account agent (for purposes pertinent to this case) is unreasonable and fails to constitute excusable neglect. *See In re VMS Ltd. Partnership Secs. Litig.*, 26 F.3d 50, 52 (7th Cir. 1994). Moreover, neither the March 31 letter, the accompanying pamphlet, nor the ensuing conversation with the Metlife sales agent could have possibly suggested to Maharg that he ignore the June 13, 1994, deadline to exclude himself from the class. The parties did not enter the settlement agreement until April 6, 1994. More important, the settlement class was not certified and the June 13, 1994, deadline was not established until April 22, 1994. Further, nothing in the March 31 letter or pamphlet even remotely suggests that Maharg refrain from excluding himself from this class action lawsuit.

Assuming that the Metlife sales agent suggested to Maharg that he refrain from participating in the Florida proceedings described in the pamphlet, that suggestion is of no consequence. The proceedings described in the pamphlet are a regulatory investigation conducted by the Florida Insurance Department, an in-house investigation conducted by Metlife, internal changes made by Metlife as a result of its in-house investigation, and a program implemented voluntarily by Metlife to provide restitution to policyholders who purchased whole life insurance from the Tampa office. Maharg could not have participated in these proceedings. The Metlife sales agent has no recollection of telling Maharg or any other policyholder that they should refrain from participating in this class action lawsuit. *See* Affidavit of Mathew A. Badger (Doc. 203).

Finally, Maharg purportedly learned about the June 13, 1994, deadline in August when he consulted with attorney Kenneth Behrend. If Maharg could consult with an attorney in

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3. Because Maharg fails to show reasonable reliance, the remaining two elements of equitable estoppel (*i.e.*, misrepresentation, detrimental reliance) need not be considered.

August, he could have consulted with an attorney before the June 13 deadline. Maharg should have consulted a competent, independent professional with his legal questions. He should not have relied (assuming he did) on his Metlife sales agent, the person with whom he allegedly had a dispute.

Maharg has not and cannot assert that he was unaware of this class action and the settlement options. The Claims Administrator sent Maharg a class notice. *See* Affidavit of G. Peter Buchband (Doc. 202); Affidavit of Lawrence A. Vranka (Doc. 201). Whether Maharg actually received the notice is irrelevant so long as Metlife complied with the court-approved notice procedures. *See In re VMS Secs. Litig.*, 1994 WL 386397, *3 (N.D. Ill. July 20, 1994). Even if Maharg's unsworn statement that he never received the class notice is true, he was on constructive notice of the pending class action and proposed settlement pursuant to the published notice contained in newspapers circulated throughout Pennsylvania. For these reasons, Eric Maharg's request for enlargement of time within which to exclude himself from the class (Doc. 174) is denied.

John Romano's request (Doc. 119B) is denied as well. Romano states that his attorney, Kenneth Behrend, posted his request for exclusion on June 13, 1994, but that it was not postmarked until June 14, 1994. However, according to a sworn admission made on Romano's behalf, this statement is untrue. On June 13, 1994, Mr. Behrend attempted to exclude Mary Romano and not John Romano. *See* Affidavit of Lorrie Wesolosky (Doc. 119A). The Claims Administrator never received a request for exclusion from John Romano. The Claims Administrator did receive from Mary Romano a request postmarked on June 14, 1994. *See* ¶ 4(b) of Affidavit of Linda Goldsmith (Doc. 191). Accordingly, because John Romano never submitted a request for exclusion as he suggests, his request for enlargement (Doc. 119B) is denied. Mary Romano, who made an unsuccessful attempt to exclude herself, has not sought any relief.

Anissa and Ronald Coulter request an enlargement of time within which to exclude themselves from the class (Doc. 174). On March 24, 1994, the Coulters filed in Pennsylvania their own lawsuit against Metlife. The Coulters do not suggest excusable neglect as a basis for seeking permission to submit an untimely exclusion. Instead, they argue that they should be excluded from the class because they manifested their intent to be excluded when they (1) filed their Pennsylvania action on March 24, 1994, and (2) filed their motion for intervention (Doc. 77) in this action on May 23, 1994. To the extent that the Coulters suggest excusable neglect, they assert that they should be relieved from the June 13, 1994, deadline because they never received a class notice.

As Metlife states in its response, "Of all the positions taken by the various applicants, the least explicable is that of Ronald and Anissa Coulter." *See* p. 14 of Metlife response (Doc. 206). In their motion for intervention (Doc. 77), the Coulters sought to exclude all Pennsylvania residents from this action or to have their attorney appointed as counsel for the Pennsylvania members of the settlement class. As class members, the Coulters also filed a notice of intention to appear and objections to the proposed settlement (Doc. 119).

"The pendency of an individual action does not excuse a class member from filing a valid request for exclusion." *In re VMS Secs. Litig.*, 1992 WL 203832, *3 (N.D. Ill. August 13, 1992). Apparently, the Coulters made a tactical decision to avoid exclusion for the purpose of objecting to the settlement and seeking significant relief (*i.e.*, exclusion of all Pennsylvania residents or appointment of their attorney as class counsel).[4]

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4. Unlike some of the other applicants, the Coulters do not deny the tactical nature of their decision. For example, in Maharg's request (Doc. 176), he states, "The decision to request exclusion at this time was not made in bad faith, i.e., to obtain any tactical advantage in the class action proceedings."

However, they cannot have it both ways. The Coulters had a choice to opt out or participate. They chose to participate. The parties were forced to respond to the numerous papers that the Coulters filed in this action. A tactical decision in litigation does not constitute excusable neglect. *See Slaughter v. Southern Talc Co.*, 919 F.2d 304, 307 (5th Cir. 1990). The Coulters will not be relieved from the consequence of their failed plan. They received the benefits of retaining their class membership (*i.e.*, objecting to the settlement and participating in the fairness hearing) and must now accept the settlement. *See, e.g., In re VMS Ltd. Partnership Secs. Litig.*, 26 F.3d 50, 51 (7th Cir. 1994).

The Coulters' assertion that they should be relieved from the June 13, 1994, deadline because they did not receive the notice is baseless. The Claims Administrator mailed a class notice to Ronald Coulter on May 2, 1994. *See* Affidavit of G. Peter Buchband (Doc. 202). Moreover, based on the Coulters' papers, they knew about the proposed settlement and became intimately familiar with its terms as early as May 5, 1994. *See* ¶ 16 of the Coulters' motion to intervene (Doc. 77). Because the Coulters knew about the June 13, 1994, deadline and had the ability to exclude themselves, their request (Doc. 174) is denied.

Finally, Jeanne Yokel requests an enlargement (Doc. 175) because she was allegedly unsure as to whether she is a member of the class. In her unverified request, Yokel asserts that the confusion was caused by her receiving a class notice even though she purchased an odd premium/even face value whole life insurance policy. Yokel's attorney qualifies her claim as "churning" and unrelated to the claims involved in this action.

Whether Yokel's policy is odd premium/even face value or even premium/odd face value is of little relevance in determining whether she is a class member. That information was relevant to identifying potential class members and determining whether a policyholder should have received a class notice. Thus, Yokel had no legitimate basis for being confused.

If Yokel was in doubt about her status, she should have erred on the safe side and protected her interests by submitting a timely request for exclusion.[5] The second sentence of the class notice states, "The purpose of this Notice is to advise you concerning three decisions you *must* make." (emphasis added). The class notice clearly informed Yokel that by failing to exclude herself she would be relinquishing her rights to file an individual lawsuit against Metlife and that she would be bound the adjudications in this action. Because Yokel has not shown excusable neglect for her failure to submit a timely request for exclusion, her request for enlargement (Doc. 175) is denied.

Although each of the applicants' requests is denied, any applicants wishing to elect the cash refund or annuity options shall do so by submitting to the Claims Administrator a properly completed proof of claim form. The form shall be *received* by the Claims Administrator on or before November 10, 1994.

ORDERED in Tampa, Florida, on October 25th, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

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5. Alternatively, prior to the June 13, 1994, deadline, Yokel could have sought a declaration that she is not a class member. At that time, she could have obtained attorney Behrend's assistance with the class notice and determined whether declaratory relief was necessary. If Yokel sought his advise in August, she could have done so in June, before the relevant deadline. *See In re VMS Partnership Secs. Litig.*, 26 F.3d 50, 51-2 (7th Cir. 1994). As mentioned earlier, the class notice that Yokel received informed her that she could not only seek assistance from her own attorney, but could contact class counsel or the Claims Administrator for additional information.

[Caption omitted in printing.] [Filed October 25, 1994.]

ORDER

Before the Court is a petition (Doc. 178) filed on September 21, 1994, by 26 individuals (the "petitioners") seeking a declaration that they are not members of the class. In the petition, these alleged policyholders assert that they "were aware that life insurance was part of the purchase they made from Metlife." Because they did not receive a class notice, the petitioners claim to be uncertain as to whether they are considered class members. Apparently, the petitioners wish to pursue individual claims against Metlife.[1]

However, the petitioners fail to provide any affidavits or other admissible evidence verifying their assertions. Further, even if they purchased their life insurance policies during the relevant period, the petitioners' allegations are insufficient to find that they are beyond the scope of the class definition. The settlement class consists of:

> all persons who purchased a Metlife whole life insurance policy as a retirement and/or other savings plan or vehicle, *based in whole or in part on written materials that allegedly did not fully disclose that these plans were life insurance products*, from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other sales office of Metlife between January 1, 1990 and October 31, 1993.

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1. The petitioners appear to be trying to do indirectly what they are unable to do directly. The deadline for opting out of the class has passed. Absent sufficient cause, all persons who qualify as class members are bound by the terms of the settlement agreement and this Court's orders.

See April 22, 1994, order (Doc. 48). Awareness that the product included life insurance fails to equate with making the purchase "based in whole or in part on written materials that allegedly did not fully disclose that these plans were life insurance products."

The Court is unwilling (1) to declare that a group of 26 individuals is not a part of the class or otherwise (2) to unravel in a piecemeal fashion and without sufficient cause the court-approved settlement. As mentioned in a separate order, one of the bargained-for purposes of the $76 million settlement agreement is to litigate the asserted claims in one forum and to bring finality to those claims. Granting the petitioners' request without a sufficient basis and forcing Metlife to litigate elsewhere would not only frustrate the purposes of the court-approved settlement and undermine the Court's orders but would be fundamentally unfair to Metlife, which is attempting to resolve all pending claims.

Accordingly, the petition (Doc. 178) is **DISMISSED WITHOUT PREJUDICE**. As Metlife suggests in its response (Doc. 190), whether a policyholder is a class member is a fact-specific inquiry that must be accomplished on a case-by-case basis. Among the pertinent factual questions may be the date on which the policyholder learned of this action and the pending settlement agreement. Thus, any petitioner wishing to obtain a declaration of their status in relation to this class action shall file on or before November 17, 1994, an individual petition making the requisite allegations supported by affidavits or other admissible evidence.

Pursuant to Rule 53, Federal Rules of Civil Procedure, and consistent with the terms of the settlement agreement (Doc. 35) and the applicable order (Doc. 48), Peter Grilli is appointed as a special master. Because of the large volume of petitions that may be filed, exceptional conditions require this appointment. Any petitions or other requests seeking either a declaration that an individual is not a member of the class or some similar relief are **REFERRED** to the special master to conduct any proceedings, including evidentiary hearings, to

prepare reports and recommendations. Each report and recommendation shall contain findings of fact and conclusions of law. Mr. Grilli shall be compensated for his time at $150 per hour and reimbursed for all out-of-pocket expenses in connection with the performance of his duties. Unless otherwise agreed to by the parties, the fees and costs associated with each petition shall be shared equally between the petitioner and Metlife. Mr. Grilli shall be paid the fees and costs immediately upon his submission to the Court of the report and recommendation.

In light of the allegations in the petitions, the possibility exists that some, and possibly all, of the petitioners may qualify as class members. As class members, prior to June 30, 1994, they could have elected the options contained in the settlement agreement (*i.e.*, annuity or cash refund). In its response (Doc. 190), Metlife offers the petitioners the same settlement options that were available initially to them even though the time for submitting a completed proof of claim form has passed. Metlife is now bound to honor that offer. Any petitioner wishing to elect the cash refund or annuity options shall do so by submitting to the Claims Administrator a properly completed claim form. The form shall be *received* by the Claims Administrator on or before November 10, 1994.

ORDERED in Tampa, Florida, on October 25th, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

[Caption omitted in printing.] [Filed October 25, 1994.]

ORDER

Before the Court is Ronald and Anissa Coulter's "Petition for Injunctive Relief Pursuant to F.R.C.P. 23(d) for Restraint of Improper Communications and For Remedial Measures to Rectify Defendant's Improper Contacts in Violation of Local Rule 4.04, and for Sanctions" (Doc. 188), filed on October 4, 1994.

In their unverified petition, the Coulters and their attorney Kenneth Behrend allege, among other things, that (1) "Metlife and/or its agents made contact with potential class members, with the aim of sabotaging the class notice," (2) "Metlife and/or its counsel permitted the class notice to be sabotaged," (3) class counsel breached a duty to prevent Metlife's alleged deceptive practices with relation to the class notice, (4) Metlife, contrary to its representations to the Court, failed to comply with the class notice procedures, and (5) Metlife's counsel breached their duties as officers of the Court. They allege also that either (1) Metlife's counsel informed Metlife of the local rules precluding it from contacting class members, and Metlife disregarded its lawyers' admonishment or (2) Metlife's counsel failed to inform its client of this provision and "purposely ignored" the rules. The Coulters and their attorney assert that the alleged actions by Metlife and its agents are "subversive and misleading" and a part of an "explicit plan" to dissuade class members from electing the settlement options.[1]

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1. Ironically, throughout their involvement with this action, the Coulters and their attorney, Kenneth Behrend, have asserted vigorously that class members should reject the terms of the settlement agreement and refuse to participate in the proceeds. Mr. Behrend has filed papers on behalf of 42 individuals seeking to avoid the settlement and has encouraged even more to do the same.

The Coulters and their attorney fail to provide any evidence whatsoever to support these extremely serious allegations against Metlife, its attorneys, and class counsel. The petition appears to have been filed for the sole purpose of causing delay, derailing the proposed class action settlement, and generating legal fees for the Coulters' attorney.[2] In fact, the Coulters request, among other things, the entire notice procedure approved by this Court redone, their lawyer appointed co-class counsel in this action, and an award of attorneys' fees and costs for the preparation of the petition.

For all the reasons established in the responses filed by class counsel and Metlife (Docs. 195 and 206, respectively) and the supporting affidavits (Docs. 193, 194, 201, 202, 203, 204, and 205), the Coulters' petition (Doc. 188) is **DENIED**. Because the petition is unworthy of additional consideration, and because the Coulters and their attorney have consumed already an inordinate amount of the parties' and the Court's resources, no further explanation of the denial is warranted.

In the final paragraphs of its response (Doc. 206), Metlife stops short of qualifying the Coulters' petition as frivolous and requesting sanctions against them and their attorney. As Metlife probably recognizes, that request may cause additional delay of this action, which, in turn, would cause an injustice to the more than 20,000 class members awaiting restitution. However, admonishing the Coulters and their attorney is appropriate under the circumstances. They should remain mindful of the provisions of Rule 11, Federal Rules of Civil Procedure. Rule 11 precludes the filing of superfluous motions for the purposes of wasting valuable resources, perpetuating undue delay, and serving

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2. On March 24, 1994, the Coulters filed in Pennsylvania their own lawsuit against Metlife. In that action, which has been stayed pending resolution of this proceeding, they seek class certification. This class action and the settlement agreement related to it may preclude the Coulters from prosecuting their claims in the Pennsylvania action.

illegitimate self-interests. If applied to the papers filed by the Coulters and their attorney, Rule 11 might well trigger relief markedly different in both effect and object from that which they proposed or contemplated.

ORDERED in Tampa, Florida, on October __, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

[Caption omitted in printing.] [Filed October 25, 1994.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING FAIRNESS OF CLASS ACTION SETTLEMENT

Before the Court is a joint motion by the named plaintiffs and the defendant, Metropolitan Life Insurance Company ("MetLife"), for approval of the proposed settlement in this action. (Docket No. 35.) This motion has been fully briefed, supported by affidavits, testimony and documents in the record, and was the subject of a full day hearing on July 18, 1994.

Based on these submissions, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Background

1. On November 1, 1993, the named plaintiffs filed their Class Action Complaint and Jury Demand. An amended complaint followed on November 19, 1993, with a second amended complaint on February 14, 1994 (the "*Horton* Complaint"). The *Horton* Complaint asserted claims based on the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 ("RICO"), the Florida Civil Remedies for Criminal Practices Act, Fla. Stat. § 772.103(1), and the common law of fiduciary duty and fraud. The Complaint sought rescission, restitution, treble damages, punitive damages and attorneys' fees and costs.

2. The central claim in this lawsuit is that certain agents of MetLife allegedly made oral or written sales solicitations to sell whole life insurance as retirement and/or other savings plans or vehicles without fully disclosing that the product sold was life insurance.

3. The lawsuit was filed in the wake of inquiries into similar allegations by the insurance departments of Florida and other states. (*See* Affidavit of Alan Neiditch, sworn to June 27, 1994, ¶¶ 3-5, Docket No. 111.)

Preliminary Court Orders

4. Before any responsive pleadings were filed, the parties entered into a Settlement Agreement on April 4, 1994 (the "Agreement").[1]

5. The proposed settlement offers settlement class members whose whole life policies are still in force the choice of:

- a cash refund of all premiums paid by the settlement class member (less any amounts already paid to him or her by MetLife, such as loans or refunds) plus interest at a rate based on MetLife annuity interest rates (including the effect of compounding);
- an annuity funded in the amount of all premiums paid (less any amounts already paid by MetLife, such as loans or refunds) plus interest; or
- the continuation of their policies.

To class members whose policies are no longer in force, the proposed settlement offers the cash refund. (Agreement ¶¶ 5(b), 5(d), 5(o), 6.)

6. The proposed settlement also provides that MetLife would pay fees and expenses of settlement class counsel as provided in the Agreement, over and above any amount paid to settlement class members, as well as the administrative costs of implementing the settlement, including the fees of the Court appointed Claims Administrator and the costs of producing and

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1. The Settlement Agreement is attached as Exhibit 1 to the parties' joint motion. It is cited herein as "Agreement" followed by the relevant paragraph number.

mailing the individual notice and publishing the publication notice. (Agreement ¶¶ 17-18.)

7. On April 12, 1994, plaintiffs and MetLife filed a joint motion seeking an Order certifying a settlement class, appointing settlement class counsel, preliminarily approving the proposed settlement, approving the form of notice to the settlement class, and scheduling a hearing date for the Court to evaluate the settlement.

8. After hearing argument on the motion on April 19, 1994, the court issued an Order on April 22, 1994 (Docket No. 48), *inter alia*,

(a) certifying as a class under Fed. R. Civ. P. 23(b)(3), solely for the purpose of settlement:

> all persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products, from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other sales office of MetLife between January 1, 1990 and October 31, 1993;

(b) designating settlement class counsel;

(c) preliminarily approving the settlement as sufficiently reasonable, adequate, and fair to warrant notice to the members of the settlement class and a full hearing on the settlement;

(d) scheduling a full hearing on the settlement;

(e) approving the form of notice and accompanying claim form;

(f) approving individual notice to an overly inclusive group of potential settlement class members consisting of: (i) all whole life policyholders who purchased from the Rick Urso & Associates sales office (the "Tampa office") between January 1, 1988 and October 31, 1993; and (ii) certain policyholders who purchased from MetLife's other offices between January 1, 1990 and October 31, 1993, and who were identified statistically as likely to be class members, or were identified empirically (through a survey of MetLife's sales offices and a review of sales literature) as likely to be class members, or complained of sales solicitations similar to those alleged in the *Horton* Complaint; and

(g) approving publication notice in 10 daily newspapers throughout the United States and in two monthly nursing magazines.

9. On April 22, 1994, the Court issued an Order, with the consent of MetLife and settlement class counsel, permitting intervention by the Florida Insurance Commissioner. (Docket No. 47.)

10. On June 14, 1994, the Court issued an Order, pursuant to Fed. R. Evid. 706, appointing an insurance expert for the purpose of analyzing the proposed settlement to assist the Court in evaluating the settlement. (Docket No. 96.) The expert provided consultation to the Court without the filing of a formal report in the court record.

Notice and Response

11. The individual notice was written in plain English and included (i) the caption, (ii) a description of the litigation, (iii) a description of the settlement class, (iv) identification of counsel for the class, (v) notification of the option to enter an appearance personally or through other counsel and the deadline for doing so, (vi) a description of the settlement, (vii) the procedure for filing objections, (viii) the hearing date, (ix) the procedure for filing requests for exclusion and the deadline for

doing so, (x) the consequences of filing an exclusion request, (xi) the consequences of remaining in the settlement class, (xii) the consequences if the settlement is or is not approved by the Court, (xiii) a description of MetLife's responsibility for attorneys' fees and (xiv) the procedure for obtaining additional information. Potential settlement class members with in force policies, who might have been concerned about their policies as a result of the notice, also received a letter from MetLife assuring them that their policies are valid and that MetLife is financially secure. (Ex. A to the Affidavit of G. Peter Buchband, sworn to July 18, 1994, Docket No. 149.)

12. The Proof of Claim form was written in plain English. It required those settlement class members who sought to make a claim to certify the truth of the following statements:

a. I purchased a MetLife whole life insurance policy that was sold to me as a retirement and/or savings plan or vehicle.

b. At or prior to the time that I made the purchase, I received from a MetLife representative a sales solicitation that did not fully disclose to me that the product I would receive was a life insurance policy.

c. I was misled by this sales solicitation, and I did not understand that I was buying a life insurance policy at the time I bought it.

(Proof of Claim Form at 1.) In addition, the Proof of Claim form (i) required a notarized signature, (ii) asked which settlement option the class member wished to elect, (iii) requested surrender of the policy and (iv) contained a release.

13. The publication notice contained (i) a description of the litigation and the settlement class, (ii) a description of the settlement, (iii) procedures for filing a request for exclusion and the deadline for doing so, (iv) the hearing date and (v) the

procedures for obtaining further information and a Proof of Claim.

14. The group proposed by the parties and approved by the Court to receive individual notice is likely to include the vast majority of settlement class members. The methodology for identifying this group was necessary because there is no direct way to identify policyholders based on the type of solicitation they received. (Affidavit of Anthony Amodeo, sworn to April 12, 1994, ¶ 5, Docket No. 40.) This methodology was the best means of identifying settlement class members through reasonable efforts and was developed in consultation with, and accepted by, both class counsel and insurance regulators. (Transcript, R. Parry at 98-99; T. Tew at 101-03; Neiditch Aff. ¶ 9.)

15. Individual notice was sent to approximately 71,000 potential settlement class members by the Court appointed Claims Administrator. Of these, a total of 730 (1.0%) were returned undeliverable. (Buchband Aff. ¶¶ 4, 23.)

16. Notices were published in the May 9, 1994 and the May 14, 1994 issues of *USA Today*, *New York Daily News*, *Los Angeles Times*, *Chicago Sun-Times*, *Philadelphia Inquirer*, *Pittsburgh Post Gazette*, *Miami Herald*, *Atlanta Journal and Constitution*, *Dallas Morning News*, *Houston Chronicle*, and *Tampa Tribune*; in the May 9, 1994 issue of the *Birmingham News*; and in the June issues of the *American Journal of Nursing* and *RN Magazine*. These publications on the dates published had a circulation of over 7 million. (*See* Affidavits of Charles Alexander, sworn to July 1 & 18, 1994, Docket Nos. 145 and 149.)

17. As of the hearing date, the Claims Administrator had received a total of 20,706 timely claim forms (29.2% of claim forms mailed) and 513 timely requests for exclusion (0.7% of individual notices mailed). (Buchband Aff. ¶¶ 20, 21, 23.) The Court has directed the parties to meet and agree on the treatment

of late filings and, if no agreement can be reached, to submit these issues to the Court by motion.

18. Only two settlement class members filed timely objections to the settlement.

19. In addition, certain other persons attempted to appear and object. However, their motions were denied as follows:

(a) The motion to intervene (Docket No. 64) by certain former MetLife sales managers — Julio Gonzalez-Roel, Kevin P. McCarron, John C. Garcia, Vincent P. Beilman, III, and John A. Ferrandes ("the former sales managers") — was denied.

(b) The motion to intervene (Docket No. 77) by Ronald and Anissa Coulter (the "Coulters") was denied. The Coulters also filed a notice of intention to appear and object (Docket No. 119) on July 1, 1994. This objection was untimely, although this untimeliness does not affect their status as settlement class members. Pursuant to this Court's April 22, 1994 Order, objections and supporting memoranda were due to be filed on or before June 13, 1994. (Docket No. 48, ¶ 10.)

(c) The motion filed by the named plaintiffs (Docket No. 106) to dismiss the notices of intention to appear and object to proposed class settlement filed by the former sales managers (excluding Mr. Ferrandes), by Kevin J. Daxon ("Daxon"), and by Daniel Richard Urso ("Urso") was granted. Specifically, Daxon's notice of intention to appear and object (Docket No. 89) was dismissed for lack of standing. Urso's notice of intention to appear and object (Docket No. 94) was dismissed for lack of standing. The former sales managers' notice of intention to appear and object (Docket No. 58) was dismissed by stipulation that the former sales managers are not settlement class members.

(*See* Order on Motions to Intervene and to Dismiss Notices of Intention to Appear and Object of Certain Purported Class Members, Docket No. 219.)

Final Settlement Hearing

20. On July 18, 1994, the Court conducted a full day hearing on the fairness of the settlement and related issues, which the parties had fully briefed.

21. At the hearing, the Court heard and considered the objections of the two settlement class members who objected in a timely fashion, the former sales managers, the Coulters, Urso and Daxon before disposing of the motions as described above.

22. At the hearing, class counsel called as a witness David Donaldson, an experienced plaintiffs' class action lawyer from the Ritchie & Rediker firm in Birmingham, Alabama, who testified that the settlement was fair and that the form of individual notice was clear and easily understood. (Transcript, Donaldson at 136-38.) Class counsel had previously filed an affidavit of Mr. Donaldson's partner, David Guin (Docket No. 143), reflecting his view that the settlement was fair.

23. At the hearing, MetLife called as a witness Daniel J. McCarthy, a consulting actuary with the firm of Milliman & Robertson, experienced in life insurance matters, who explained features of the settlement and testified that the settlement, including each of the settlement options as well as the interest rate, was fair and that the individual notice was likely to reach the vast majority of the settlement class. (Transcript, McCarthy at 177-94.)

24. MetLife has committed and confirmed at the July 18, 1994 hearing (*see* Transcript at 200) that it will either (i) provide Restitution (as defined in the Settlement Agreement) to class members who withdrew from the Florida Prepaid Tuition Program or, at the option of the settlement class member, (ii) to

the extent permitted by the Florida Prepaid Tuition Program, obtain those persons' reinstatement in that Program.

Facts Relating to the Fairness of the Settlement

25. The settlement offers full restitution to settlement class members. The settlement is at the top of the range of possible compensatory damages. It is not discounted to reflect the risks, delays or costs of litigation.

26. The following are issues that could present obstacles to plaintiffs' success at trial (which obstacles might or might not be overcome) if this matter were to proceed in litigation:

- establishing the elements necessary to obtain class certification, if this case were litigated rather than settled;
- proving that any settlement class member was unaware that he or she had purchased life insurance in view of written disclosures made to and acknowledgements signed by settlement class members;
- overcoming the defense that their RICO claims are precluded by the McCarran-Ferguson Act;
- overcoming the defense that their Florida Civil Remedies for Criminal Practices Act claims are precluded by the Florida Unfair Insurance Trade Practices Act;
- establishing the necessary elements of their RICO, Florida Civil Remedies for Criminal Practices Act and common law claims; and
- establishing that settlement class members' claims are timely under applicable statutes of limitations.

27. This action, if litigated, would be complex, expensive and time-consuming.

28. Negotiations leading to the settlement lasted several months and, at times, were acrimonious. (*See* Affidavit of Lorna G. Schofield, sworn to June 27, 1994, Docket No. 117;

Affidavits of Ron Parry, sworn to April 19, 1994, Docket No. 45, and June 28, 1994, Docket No. 109, Ex. C; Affidavit of Judy S. Hoyer, sworn to April 7, 1994, Docket No. 109, Ex. D.) There is no evidence of collusion.

29. More than 40 state insurance regulators have approved the substance of the proposed settlement, including the settlement amount and the methods for identifying those persons who received individual notice. (Neiditch Aff. ¶¶ 2, 8-9.)

CONCLUSIONS OF LAW

Subject Matter Jurisdiction

30. The Court has jurisdiction over the federal claims under 18 U.S.C. § 1964(c) and 28 U.S.C. § 1331.

31. The Court has supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367.

32. In arguing the weaknesses in plaintiffs' case, MetLife has asserted that the McCarran-Ferguson Act precludes plaintiffs' RICO claims. Plaintiffs have disputed this issue. In either event, the Court has subject matter jurisdiction. Even if MetLife is correct, the Court has subject matter jurisdiction because the federal claims alleged in this Complaint are not devoid of merit on their face. *See Nelson v. Greater Gadsden Housing Auth.*, 802 F.2d 405, 408 (11th Cir. 1986). Moreover, successfully asserting the McCarran-Ferguson Act as an affirmative defense would result in the dismissal of plaintiffs' RICO claims *on the merits* for failure to state a claim, and not for lack of subject-matter jurisdiction. *Dexter v. Equitable Life Assurance Soc'y*, 527 F.2d 233, 236-37 (2d Cir. 1975).

33. The Court also has determined to exercise its supplemental jurisdiction over state law claims in this case in the interests of judicial economy, convenience, and fairness to litigants, particularly the more than 20,000 who have filed Proof of Claim forms and indicated their desire to accept the restitution set forth in the Settlement Agreement.

Class Certification

34. The certified settlement class is sufficient under Fed. R. Civ. P. 23 for settlement purposes. The standards of Rule 23 for class certification are more easily met in the context of settlement than in the context of contested litigation. *White v. National Football League*, 822 F. Supp. 1389, 1402 (D. Minn. 1993); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 157-158 (S.D. Ohio 1992); *Dalkon Shield Claimants' Comm. v. Aetna Cas. & Sur. Co. (In re A.H. Robins Co.)*, 85 B.R. 373, 378 (E.D. Va. 1988), *aff'd*, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

Adequacy of Notice

35. Elements of Rule 23(c)(2) notice (for class certification) are combined with elements of Rule 23(e) notice (for notice of settlement or dismissal) where, as here, the parties have sought simultaneously to certify a settlement class and settle a class action. *Hitt v. Nissan Motor Co. (In re Nissan Motor Corp. Antitrust Litig.)*, 552 F.2d 1088 (5th Cir. 1977).

36. The notices to potential class members provided all the information material to making an informed and intelligent decision whether to participate in the settlement class and the settlement. *See id.* at 1105. This notice fairly and reasonably advised potential class members of their rights under the settlement, and constituted due and sufficient notice for all other purposes to persons entitled to receive notice required by due process and Rule 23.

37. The methodology used to identify potential class members to receive individual notice was "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). Rule 23 does not require actual notice to each and every possible class member where, as here, a precise list of actual settlement class members could not be created. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 168 (2d Cir.

1987), *cert. denied*, 484 U.S. 1004 (1988); *Burns v. Elrod*, 757 F.2d 151, 154 (7th Cir. 1985). Supplementing individual notice with publication notice represents an appropriate balance between protecting class members and making Rule 23 workable. *See Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490 (1988); *In re Agent Orange*, 818 F.2d at 168-69; *Manual for Complex Litigation, Second* § 30.21 at 223 (1986). The Court concludes that the individual notice and publication notice collectively constituted the most effective and practicable notice under the circumstances of the pendency of the class action, proposed settlement and settlement hearing, and thereby satisfied the requirements of Rule 23(c)(2) (as well as Rule 23(e)).

Objections

38. Two settlement class members filed timely objections to the settlement with the Court. They asserted, respectively, that (a) the settlement should provide for punitive damages, and (b) the annuity is insufficient settlement relief. These objections were considered and are rejected because the settlement provides 100% of compensatory damages, and punitive and treble damages are not to be considered in determining the upper range of possible recovery for settlement purposes. *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 319 n.25 (N.D. Ga. 1993); *Namoff v. Merrill Lynch, Pierce, Fenner & Smith (In re Dennis Greenman Sec. Litig.)*, 622 F. Supp. 1430, 1441 (S.D. Fla. 1985), *rev'd on other grounds*, 829 F.2d 1539 (11th Cir. 1987).

39. The objections raised by the Coulters, although not timely filed, were considered and rejected. The Coulters' objection merely refers back to their motion to intervene and supporting arguments, which were briefed, argued and rejected. (*See* Order on Motions to Intervene and to Dismiss Notices of Intention to Appear and Object of Certain Purported Class Members, Docket No. 219.)

40. The Court considered the objections raised by the former sales managers and Daxon, even though they are not class members and lack standing to raise the objections. (*See* Order on Motions to Intervene and to Dismiss Notices of Intention to Appear and Object of Certain Purported Class Members, Docket No. 219.) Certain of those objections are antithetical to the interests of the settlement class and are rejected.

41. The remaining objections of the former sales managers and Daxon are as follows:

(a) They objected that the notice does not adequately warn class members of the risks of surrendering their whole life insurance policies and claiming a full refund. This objection is rejected. The notice clearly presented the settlement options and warned policyholders to consider carefully whether cancellation of their life insurance was in their best interests. Such notice is legally sufficient. *Grunin v. International House of Pancakes*, 513 F.2d 114, 122 (8th Cir. 1974) (fact that notices do not fully explore options is immaterial because class members "are not expected to rely upon the notices as a complete source of settlement information"), *cert. denied*, 423 U.S. 864 (1975); *Battle v. Liberty Nat'l Life Ins. Co.*, 770 F. Supp. 1499, 1522 (N.D. Ala. 1991) (denying movants' claim that settlement notice was misleading and/or incomplete because it allegedly did not explain effect of settlement provisions on policyholders), *aff'd*, 974 F.2d 1279 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 2999 (1993). The Court concludes that additional information about settlement options would have made the notice lengthy, confusing and would have been inappropriate, particularly in light of the nature of the allegations asserted in this action. *See In re Farmers Group Stock Options Litig.*, [1991-1992] Fed. Sec. L. Rep. (CCH) ¶ 96,522, at 92,378 (E.D. Pa. Dec. 19, 1991) (settlement notice must "be neutral in its description of class member options"; fuller details of settlement options would have "counterproductively engendered confusion" given the speculative nature of information, especially where class members

presumably could consult with their own brokers if they had questions regarding settlement).

(b) The former sales managers and Daxon objected that the release as set forth in the proof of claim is overly broad in that it could cover derivative claims. This objection is rejected. Derivative claims belong to and are brought on behalf of the corporation, and not any individual. *See, e.g.*, Fed. R. Civ. P. 23.1. Derivative claims on behalf of the company relating to the sales solicitations at issue have already been asserted. (*See, e.g.*, Derivative Complaint, Ex. B to the former sales managers' Objection, Docket No. 35.) If those claims result in a recovery in favor of the company, those funds will be paid to the company and not to any individual. *See, e.g., In re General Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1087 (6th Cir.) ("Any relief obtained [in a derivative action] belongs to the corporation only"), *cert. denied*, 469 U.S. 858 (1984); *Recchion ex rel. Westinghouse Elec. Corp. v. Kirby*, 637 F. Supp. 1309, 1315 n.1 (W.D. Pa. 1986) ("Any recovery in a derivative action belongs to the corporation," citing *Ross v. Bernhard*, 396 U.S. 531, 538 (1970)).

(c) The former sales managers and Daxon objected that the settlement class includes either too many or too few potential claimants. This objection is rejected. No precise list of settlement class members can be compiled because the parties cannot determine which policyholders received (and relied on) allegedly misleading sales solicitations. (Amodeo Aff. ¶ 5.) Individual notice was provided to an overly broad group of potential settlement class members and was supplemented by broad publication notice. As stated above, the Court has concluded that this notice was "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). Notice to a greatly overinclusive group of all MetLife whole life policyholders is unwarranted and impractical because the vast majority of those persons probably knew they were

buying life insurance and were not misled by allegedly improper sales solicitations. *See In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 169 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988) (court did not require individual notice to every Vietnam veteran in order to reach a class consisting of such veterans who had been exposed to Agent Orange).

(d) The former sales managers and Daxon objected that the settlement is collusive. This objection is rejected as baseless. No evidence of collusion exists.

(e) The former sales managers objected that the class definition is inconsistent with the Proof of Claim form in that the latter includes a requirement that a class member certify that he or she had been misled, even though the class definition does not do so. This objection is rejected because the settlement class is properly defined in objective terms. Class membership should not depend on a determination of the merits of each potential class member's claims. *Manual for Complex Litigation, Second* § 30.14 (1986). Moreover, the settlement class was certified for the sole purpose of resolving the claims asserted in the Complaint, which in substance allege that policyholders were misled in the purchase of their whole life insurance policies. Thus, class members who sought to make a claim were appropriately required to assert that they were misled in the purchase of their policy and did not understand that they were buying a life insurance policy at the time they purchased it in order to participate in the settlement.

42. Urso asserted substantially the same objection concerning the certification required in the Proof of Claim form. The Court has considered and rejects the objection for the reasons stated above, even though Urso is not a settlement class member and therefore lacks standing to raise the objection. (*See* Order on Motions to Intervene and to Dismiss Notices of Intention to Appear and Object of Certain Purported Class Members, Docket No. 219.)

Fairness of Settlement

43. There are six factors to consider in determining whether a class action settlement is fair and adequate. *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *Cotton v. Hinton*, 559 F.2d 1326, 1330-31 (5th Cir. 1977). These factors support approval of the settlement in this case.

44. (First factor:) The risk that plaintiffs would lose on the merits at trial supports approval of the settlement. *See Bennett*, 737 F.2d at 986.

45. (Second and third factors:) The amount of the settlement, which here is at the upper end of the range of possible recovery, supports approval of the settlement. *Bennett*, 737 F.2d at 986; *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977).

46. (Fourth factor:) The prospect of complicated, expensive and time-consuming litigation if the case were not settled supports approval of the settlement. *Bennett*, 737 F.2d at 986; *Warren v. City of Tampa*, 693 F. Supp. 1051, 1059 (M.D. Fla. 1988), *aff'd*, 893 F.2d 347 (11th Cir. 1989).

47. (Fifth factor:) The virtual lack of objections from settlement class members, and the lack of substance of objections that were made, support approval of the settlement. *Bennett*, 737 F.2d at 986, 988 & n.10; *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 180 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981); *Meyer v. Citizens & Southern Nat'l Bank*, 677 F. Supp. 1196, 1212 (M.D. Ga. 1988).

48. (Sixth factor:) The stage of the proceedings at which the settlement was achieved, prior to formal discovery, does not weigh against approval of the settlement. *Adams Extract Co. v. Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litig.)*, 643 F.2d 195, 211 (5th Cir. April 1981); *Cotton*, 559 F.2d at 1332. Here the settlement was not discounted to reflect the risk of loss, and class counsel had access to a great deal of

other information, obtained from such sources as extensive press reports, their own clients, and the report of Thomas Tew on behalf of the Florida Commissioner of Insurance. (*See generally* Parry Aff. ¶ 12, Docket No. 109.)

49. The absence of evidence that the settlement is the product of anything other than arm's-length, non-collusive negotiations supports approval of the settlement. *Cotton*, 559 F.2d at 1330; *Behrens v. Wometco Enters.*, 118 F.R.D. 534, 538 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990); *Warren*, 693 F. Supp. at 1055.

50. The Court has given weight to the views of counsel who negotiated the settlement as to the merits of the settlement. *See Cotton*, 559 F.2d at 1330; *Ressler v. Jacobson*, 822 F. Supp. 1551, 1552 (M.D. Fla. 1992). The Court has also considered the views of experts who have examined the settlement and found it to be fair and adequate.

51. In addition, the Court has considered and accorded great weight to the approval given to the restitution plan embodied in the settlement by more than 40 independent state insurance regulators around the country as evidence that the settlement is fair and was the product of arm's-length, non-collusive negotiations. *See Marshall*, 550 F.2d at 1178; *Scholes v. Stone, McGuire & Benjamin*, 839 F. Supp. 1314, 1318 (N.D. Ill. 1993).

52. The settlement is fair, adequate and reasonable and not the product of collusion between the parties.

In Tampa, Florida, on October 25th, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

[Caption omitted in printing.] [Filed October 25, 1994.]

ORDER

Before the Court is a "Petition of Clarence Ridgeway Requesting Exclusion from the Horton Settlement Class" (Doc. 198), filed on October 11, 1994. The plaintiffs filed a response (Doc. 213) on October 18, 1994. As the response points out, the petition fails to establish excusable neglect for Mr. Ridgeway's failure to file a timely request for exclusion. The reasons set forth in the order (Doc. 221) denying similar requests for enlargement apply to Mr. Ridgeway's petition as well.

ORDERED in Tampa, Florida, on October 25th, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

[Caption omitted in printing.] [Filed August 22, 1994.]

INTERVENORS' NOTICE OF APPEAL

Pursuant to Fed. R. Civ. P. 4(a)(2), Notice is hereby given that Ronald and Anissa Coulter, Representatives of the Coulter Class of Pennsylvania residents similarly injured by MetLife's sale of insurance policies which contain language unapproved by the Pennsylvania Insurance Commission, and a subclass of Pennsylvania residents who purchased retirement plans which in reality were life insurance policies, named as Intervenors in the above-captioned action, hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the order denying the Coulter Class' Motion for Intervention, announced by the Court in this action on the eighteenth day of July 1994.

Respectfully submitted,

/s/ Kenneth R. Behrend
Kenneth R. Behrend
BEHREND & ERNSBERGER
2400 Grant Building
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fax (412) 391-2762

DATED: AUGUST 17, 1994

[Proof of service omitted in printing.]

[Caption omitted in printing.] [Filed November 22, 1994.]

NOTICE OF APPEAL

Pursuant to Fed. R. Civ. P. 4(a)(1), Notice is hereby given that Douglas and Roena Conner, Ronald and Anissa Coulter, Darrin Johns, Joann Kablach, Eric Maharg, Terrance McConnell, Deborah Myers, Terry and Marjorie Palmer, Brian Rohm, James and Mary Romano, Albert Darren Wise, and Jeanne Yokel, named as Petitioners in the above-captioned action, hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the order denying their Requests For an Enlargement of Time Within Which To Seek Exclusion from the Horton Class, issued by the Court on October 25, 1994.

Respectfully submitted,

/s/ Paul A. Nelson

Paul A. Nelson, Esq.
100 West Kennedy Boulevard
Suite 660
Tampa, FL 33602

DATED: NOVEMBER 22, 1994

[Proof of service omitted in printing.]

[Caption omitted in printing.] [Filed November 22, 1994.]

NOTICE OF APPEAL

Pursuant to Fed. R. Civ. P. 4(a)(1), Notice is hereby given that Edward Beliunas, Paulette Beliunas, John Brooks, Stephanie Charles, Shelley A. Daughenbaugh, Jerilyn Freiwald, Nina Heathcote, Robert W. Hemcher, Kenneth D. Johnson, Michele R. Johnson, Frieda E. Kamel, Jerome J. Knorr, Enod S. Knorr, George Liptak, Ruth Liptak, Kenneth J. Magnes, Sandra Marie McCue, Mark A. Ondrusek, Ernestine Peterson, Rori K. Rasel, Clarence Ridgeway, Emily N. Riehl, Joan C. Valenta, Robert Dale Wiles, and Catherine Wiles, named as petitioners in the above-captioned action, hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the order denying their Request for a Declaration That They Are Not Horton Class Members, issued by the Court on October 25, 1994.

Respectfully submitted,

/s/ Paul A. Nelson

Paul A. Nelson, Esq.
100 West Kennedy Boulevard
Suite 660
Tampa, FL 33602

DATED: NOVEMBER 22, 1994

[Proof of service omitted in printing.]

[Caption omitted in printing.] [Filed November 22, 1994.]

NOTICE OF APPEAL

Pursuant to Fed. R. Civ. P. 4(a)(1), Notice is hereby given that Ronald and Anissa Coulter (Intervenors), hereby appeal to the United States Court of Appeals for the Eleventh Circuit, from the Order denying their Petition for Injunctive Relief Pursuant to Fed.R.Civ.P. 23 (d) for Restraint of Improper Communications and for Remedial Measures to Rectify Defendant's Improper Contacts in Violation of Local Rule 4.04, and for Sanctions, issued by the Court on October 25, 1994. This is not an appeal from the Court's Order approving the Horton Class settlement. This Notice of Appeal does not include any class member who has availed themself of a refund or MetLife annuity pursuant to the Horton Class Settlement Order. The appeal encompasses only those policyholders who did not avail themselves of the relief afforded by the settlement class notice because of communications by MetLife which were not approved by the Court pursuant to Local Rule 4.04.

Respectfully submitted,

/s/ Paul A. Nelson

Paul A. Nelson, Esq.
100 West Kennedy Boulevard
Suite 660
Tampa, FL 33602

DATED: NOVEMBER 22, 1994

[Proof of service omitted in printing.]